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Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE J. BRADY, BARBARA A. BRADY,
DEBORAH R. LABOVITZ, AND JUDAH I. LABOVITZ,

PETITIONERS,

V.

THE STATE OF NEW YORK, MARIO CUOMO,
AND JAMES WETZLER,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ALBERT G. LAUBER, JR.
CAPLIN & DRYSDALE,
CHARTERED
ONE THOMAS CIRCLE
WASHINGTON, D.C. 20005

SCOTT H. MUSTIN
LABRUM & DOAK
1818 MARKET STREET
SUITE 2900
PHILADELPHIA, PA 19103

JOSEPH H. EINSTEIN
GOODKIND, LABATON, RUDOFF &
SUCHAROW
122 EAST 42ND STREET
NEW YORK, NY 10168

DAVID H. WEINSTEIN*
ROBERT S. KITCHENOFF
LINDSEY B. SLAUGHTER
KOHN, NAST & GRAF, P.C.
1101 MARKET STREET
SUITE 2400
PHILADELPHIA, PA 19107
(215) 238-1700

ATTORNEYS FOR PETITIONERS

*COUNSEL OF RECORD

QUESTION PRESENTED

Whether New York's method of taxing the income of nonresidents, as amended in 1987 (N.Y. Tax Law § 601(e)), violates the Due Process Clause of the Fourteenth Amendment or the Privileges and Immunities Clause of the United States Constitution.

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W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309 (1974) 17, 21, 22

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The opinion of the New York Court of Appeals (App., *infra*, 3a - 16a) is reported at 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060. The opinion of the Appellate Division of the New York Supreme Court (App. 17a - 24a) is reported at 172 A.D.2d 17, 576 N.Y.S.2d 896. The trial court's opinion (App. 25a - 30a) and order (App. 31a - 33a) are not reported.

JURISDICTION

The judgment of the New York Court of Appeals (App. 16a) was entered on December 22, 1992. On March 9, 1993, Justice Thomas extended the time within which to petition for a writ of certiorari to and including April 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution; and the pertinent provisions of sections 601(d) and 601(e) of the New York Tax Law, are set out in a statutory appendix (App. 1a - 2a).

STATEMENT

1. For many years, New York has imposed its income tax on both residents and nonresidents. Prior to 1987, nonresidents were taxed under a method that considered only their New York source income. A nonresident calculated taxable New York income by subtracting from gross New York source income the exemptions and deductions to which he or she was entitled. Taxable New York income was then multiplied by the applicable graduated tax rate to determine the tax due. Under this methodology, residents and nonresidents with identical New York source income and deductions would have identical tax liabilities.

New York amended its Tax Law in 1987. The new statute had the effect of decreasing tax rates generally, an effect obviously beneficial to New York residents, while at the same time increasing the taxes due from nonresidents. The latter result was accomplished by adding § 601(e) to the Law, effective in 1988.

Under new § 601(e), a nonresident taxpayer is required, for the first time, to calculate his or her New York tax liability by deriving it from the tax determined "as if such nonresident . . . were a resident." To make this determination, § 601(e) requires the nonresident taxpayer to proceed in two steps. First, the nonresident must calculate the amount of New York tax that would be payable on the total amount of his or her income from all sources, not just New York. With certain modifications, this amount is the same as federal "adjusted gross income" as reported to the IRS. Thus, in the case of a married nonresident taxpayer filing a joint federal return, the total income required to be used in this calculation is the total of the incomes of both the taxpayer and the taxpayer's spouse. That is so even if the spouse is also a nonresident and has no income whatever from New York sources.

The second step involves apportioning part of this calculated New York tax to the State. This is done by multiplying the calculated tax by an apportionment fraction (New York income divided by adjusted gross income). The result is the nonresident's New York tax liability.

As part of the same 1987 law, New York also imposed a new surtax on unearned (investment) income of residents and nonresidents. The surtax, enacted as § 601(d) of the Law, was imposed only for 1987 and 1988. When § 601(e) became effective in 1988, the interrelationship of the two statutory provisions for that one year resulted in nonresidents paying more tax even if they had no unearned income from New York sources. This is because, under § 601(e), a nonresident must first compute a New York tax on total income as if he or she were a resident, and because New York taxes its residents' unearned income without regard to the state of its origin. The statutory scheme thus had the practical effect of imposing the New York surtax on nonresidents' investment income that had no nexus to New York.

The impact of the 1987 amendments may be illustrated by a simplified example. Assume a New York and a Pennsylvania resident, each of whom is married and earns New York taxable income of $18,000. Assume that the Pennsylvania resident also has Pennsylvania source income of $30,000, of which $10,000 is unearned; and that his spouse has Pennsylvania source income of $70,000, of which $25,000 is unearned. Assume that none of the four people has any other income.

For the 1986 tax year, the New York and the Pennsylvania residents would each pay the same tax on their New York income,

namely, $1,145.[1] For the 1988 tax year, on identical facts, the New York resident would pay tax of $772—33% less than he paid in 1986.[2] The Pennsylvania resident would pay tax of $1,346—18% more than he paid in 1986, and 74% more than his New York counterpart pays in 1988.[3] This heavier tax burden has two causes: (1) the inclusion in the tax computation of Pennsylvania source income of the taxpayer and his spouse, which pushes him into a higher tax bracket; and (2) the imposition of New York's unearned income surtax on the couple's Pennsylvania investment income. New York originally estimated that the overall effect of the 1987 amendment would be to increase the tax burden of nonresident taxpayers by approximately $50 million annually.[4] The actual tax burden has since grown to $80 million.[5]

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1 Both taxpayers would be in a 10% marginal bracket for 1986 and both would pay tax of $945 on the first $16,000 of income, plus 10% of the excess between $16,000 and $18,000.

2 The New York resident would be in a 6% marginal bracket for 1988 and would pay tax of $568 on the first $14,600 of income, plus 6% of the excess between $14,600 and $18,000.

3 The Pennsylvania resident's New York income would be combined with his Pennsylvania income and that of his spouse, for a total of $118,000. This would put him in an 8% marginal bracket. He would compute a hypothetical New York tax of $8,696, plus a tax of $126 on the couple's Pennsylvania investment income, for a total of $8,822. That figure would be multiplied by an apportionment fraction of 15.25% ($18,000 divided by $118,000), yielding a New York tax liability of $1,346.

4 N.Y. Times, Feb. 16, 1989, at A1.

5 *State Tax Notes* 708 (Mar. 29, 1993).

2. Petitioner Lawrence Brady is a resident of New Jersey and was employed in New York during the relevant tax period. His wife, petitioner Barbara Brady, resided in New Jersey and was employed there. App. 3a. Petitioner Deborah Labovitz is a resident of Pennsylvania and was employed in New York during the relevant tax period. Her husband, petitioner Judah Labovitz, resided in Pennsylvania and was employed there. App. 3a. Lawrence and Deborah were "nonresident taxpayers" subject to § 601(e) of the New York Tax Law. Neither of their spouses had New York source income of any kind. App. 3a, 17a.

Petitioners brought this action in March 1989 in the New York Supreme Court, Albany County. Their amended complaint sought damages and injunctive and declaratory relief for themselves and for a class of similarly situated nonresident taxpayers. Petitioners contended, among other things, that New York's scheme for taxing nonresidents is unconstitutional on its face and as applied because it (1) violates the Due Process Clause of the Fourteenth Amendment by, in effect, imposing a tax on income from non-New York sources; and (2) violates the Privileges and Immunities clause by discriminating against nonresidents. The facts on the constitutional issues were not contested, and the case was submitted on cross-motions for summary judgment to the trial court, which ruled for the State in all respects. App. 25a, 31a.

On appeal, the Appellate Division of the Supreme Court affirmed in part and reversed in part. App. 17a.[6] The court sustained petitioners' due process challenge to the application against nonresidents of Tax Law § 651(b)(2), which generally requires a married couple to file a joint New York return if they file a joint federal return. The court noted that this provision rendered a nonresident spouse liable for a variety of New York

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6 The Commonwealth of Pennsylvania appeared in the Appellate Division as amicus curiae supporting petitioners.

taxes and penalties despite the fact that he or she has no New York income and no other contacts with the State. App. 20a. Citing the Court's decision in *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), the Appellate Division concluded that "[o]ut-of-State cohabitation with a spouse having New York income and filing a joint Federal income tax return with that spouse cannot constitute the necessary minimum connection for the extraterritorial exercise of New York's taxing power." App. 20a. The court accordingly held that § 651(b)(2) "violates due process insofar as it may be applied to require a nonresident spouse of a nonresident taxpayer to file a joint State tax return" in these circumstances. App. 20a. The court rejected petitioner's constitutional challenges in all other respects and remitted the case to the Supreme Court "for further proceedings not inconsistent with [its] decision." App. 24a.

3. On petitioners' subsequent appeal, the New York Court of Appeals on December 22, 1992, affirmed by a divided vote. App. 16a.[7] The majority held that New York may constitutionally determine a nonresident's tax by reference to income earned outside the State, whether earned by the taxpayer or by his or her spouse. App. 6a-7a. In effect, the court ruled that the due process violation found by the Appellate Division, which the State did not appeal, would be avoided notwithstanding the forced inclusion on the return of the nonresident spouse's income and its use in determining the taxpayer's tax, provided that the spouse was not required physically to sign the return.

The four-member majority asserted that the case raises "no question about which of the jointly reported income is taxable and which not; the question is how to determine the rate on income clearly subject to New York tax." App. 9a. The majority held

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7 The New Jersey State Assembly appeared in the Court of Appeals as amicus curiae supporting petitioners.

that § 601(e) is constitutional, asserting that *Maxwell v. Bugbee*, 250 U.S. 525 (1919), and *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), permit the State to "refer to non-taxable out-of-state assets in setting their rates for taxable assets." App. 7a. "When the state levies taxes within its authority," the court said, "property not itself taxable can be used as a measure of the tax imposed" and the tax in that event "is in no just sense a tax on the foreign property." App. 8a, quoting *Maxwell v. Bugbee*, 250 U.S. at 539.

The Court of Appeals rejected petitioners' contention that *Maxwell* and *Grosjean* have been superseded by subsequent doctrinal developments in this Court's more recent decisions. The majority stated that these more recent decisions "deal[] with business taxation and interstate commerce" and "address whether a state can tax interstate corporate income in exchange for the privilege of carrying on its business." App. 8a, 9a. The court also rejected petitioners' Privileges and Immunities challenge, holding that New York does not discriminate against similarly situated taxpayers when the family's ability to pay, as reflected in its total income, is considered. App. 10a. The court did not otherwise discuss the constitutionality of New York's reference to a nonresident spouse's separate out-of-state income in fixing the rate of tax on a taxpayer's income from New York sources.

In dissent, Judge Hancock concluded that *Maxwell* and its progeny are inconsistent with this Court's modern jurisprudence and that New York's taxing scheme therefore violates the Due Process Clause. App. 11a *et seq.* Relying upon Justice Holmes' dissent in *Maxwell*, Judge Hancock explained that the 1987 amendment has the effect of imposing a tax on nonresidents' out-of-state income, "no matter how the tax is described." App. 16a. By way of amplification, Judge Hancock stated (App. 15a-16a, footnote omitted):

> Whether the [Supreme] Court will again resort to the *Maxwell*-type of labelling in order to uphold a taxing scheme—where out-of-state income of the taxpayer and the taxpayer's spouse is used to increase the tax on the taxpayer's in-state income—only the Supreme Court can tell us. If the answer should be "yes", then I respectfully submit that the answer would be inimical to Justice Holmes' common sense appraisal of the tax in *Maxwell* and to the Court's recent method of analyzing state taxation Due Process problems by looking at the practical effect and the economic realities rather than "formal phrasing."

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the constitutional limitations on a state's power to tax the income of nonresidents. Given the increasing prevalence of commuter taxes in state tax regimes, this question has great practical significance. Left unresolved, it portends disharmony among the states, highlighted by the retaliatory actions that New York's neighbors have taken against the tax scheme challenged here.

1. The Due Process Clause prohibits New York from including income from outside the State in the calculation of tax due on a nonresident's income from inside New York. The challenged scheme is unconstitutional, not only because it considers the nonresident's out-of-state income in determining the tax, but also because it uses the income of someone with whom the State admittedly has no due process contact, namely the taxpayer's nonresident spouse, in fixing the tax owed by the taxpayer.

At the heart of New York's tax methodology is a myth. The State first requires nonresidents to calculate their New York tax *as*

if they were residents. Yet the reality is that they are not residents. By failing to respect the distinction in the obligations and concomitant powers of the state of domicile compared to those of all other states, New York has, in effect, improperly taxed income with which the State has no due process nexus.

Because of the plenary authority a state exercises over its own residents and the broad range of services and protection it provides them, a state may tax its residents' income irrespective of its origin. *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937). As Justice Stone stated for the Court,

> A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. *These are rights and privileges which attach to domicil within the state.*

Id. at 313 (emphasis supplied).

On the other hand, a nondomiciliary state may tax income or property of a nonresident only to the extent that the thing being taxed is within the jurisdiction of the taxing state. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). Moreover, to pass constitutional muster, the tax must in some sense be proportional to the services and protection rendered by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940) (describing due process test as "whether the taxing power exerted by the state bears *fiscal relation* to protection, opportunities and benefits given by the state") (emphasis supplied).

New York violates these time-honored constitutional principles in at least two respects. First, the challenged statute in effect taxes income earned outside the State. The impact on nonresidents of New York's 1987 amendment is exactly the same as if New York had imposed a distinct new tax on out-of-state income. In the example referred to earlier (*see* pages 3-4, above), the Pennsylvania resident is in the same economic position versus his New York counterpart that he would have occupied if New York had simply taxed his Pennsylvania-source income and that of his spouse at a rate of 5.74%.

Second, the additional New York tax imposed on nonresidents by the 1987 amendment bears no relation to any added services or protection provided by the State. The best measure of the extent to which New York has provided services and protection to justify its tax is the income actually generated by the nonresident in New York. In contrast with that person's state of residence, New York has no hand in helping the nonresident earn income elsewhere and affords no protection or services that contribute to enjoyment of the fruits of such out-of-state income.[8] The State therefore cannot justify increasing the tax on a nonresident's income merely because of the fortuity that the taxpayer and his or her spouse have additional income from outside the state. As Judge Hancock explained in dissent below (App. 16a), New York is effectively taxing that non-New York income:

> A statute which includes out-of-state income of the taxpayer and the taxpayer's spouse for the purpose of

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8 *A fortiori*, New York has no greater justification for looking to the out-of-state income of the taxpayer's nonresident spouse in measuring the tax than it would have for looking to the out-of-state income of the taxpayer's parents or children. New York has provided neither the opportunity to obtain such income nor services and protection related to the use thereof.

> increasing the tax on the in-state income and which results in such increase imposes a tax on the out-of-state income in violation of the Due Process clause—no matter how the tax is described. To pretend that it does not endorses a Due Process violation and works a distinct unfairness on taxpayers such as the New Jersey and Pennsylvania residents in this case.

The Court has similarly held that the validity of a state tax hinges not on "the formal language of the tax statute but rather [on] its practical effect." *Complete Auto Transit*, 430 U.S. at 279. In *Trinova Corp. v. Michigan*, 111 S.Ct. 818 (1991), for example, the Court rejected a threshold defense to the constitutionality of Michigan's single business tax (SBT), explaining (*id.* at 829):

> [L]abeling the SBT a tax on "business activity" does not permit us to forgo examination of the actual tax base and apportionment provisions. "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."

For similar reasons, New York's tax on nonresidents measured by income they earn outside the State is a tax on that out-of-state income, whatever form of words the legislature chooses to use.

What makes this scheme particularly offensive is that the burden falls exclusively on citizens who have no voice in the taxing decision and, but for the constitutional rights asserted here, no protection against it. The intended effect of § 601(e)'s methodology, in conjunction with New York's progressive rate structure, is to increase the effective tax rate applicable to the New

York income of disenfranchised nonresidents.[9] The State has raised several hundred million dollars of additional tax from the one segment of its taxpayers that had no representation in its legislature.[10]

The United States Court of Appeals for the Third Circuit has recognized that New York's statute essentially taxes non-New York income. Although rejecting under 28 U.S.C. § 1341 a federal court challenge to the tax, the court noted that the 1987 amendments "cause[d] some shifting of the tax burden to non-New Yorkers whose position as compared to New York residents is less favorable than under previous law." *Hardwick v. Cuomo*, 891 F.2d 1097, 1100 n.6 (3d Cir. 1989). This is because under the new scheme, "the same rates . . . yield more taxes from the same income than would be generated under a system not considering [nonresidents'] out-of-state income." *Id.*, at 1099. While New York residents generally benefitted from the lower tax rates enacted in 1987, from the standpoint of nonresidents "the title of the 1987 law as the Reform and Reduction Act, [was] euphe-

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9 Even were there no progressivity in rates, the methodology also effectively reduces the value to nonresidents of exemptions and deductions.

10 The due process violation created by New York is not mitigated by credit provisions in other states. The credit Pennsylvania gives its residents, for example, does not offset the full amount of additional tax paid, in this case, to New York. The credit may not exceed the Pennsylvania tax applicable to the New York-source income that New York has taxed. New Jersey and many other states impose a similar restriction on any credit they may give. *See Hardwick v. Cuomo*, 891 F.2d 1097, 1100 n.5 (3d Cir. 1989). The credit is thus extremely small in Pennsylvania, which has a relatively low income tax rate (2.1% during 1987-1990), and is non-existent in states with no income tax, such as Connecticut until recently.

mistic." *Id.* Thus, as contrasted with the tax at issue in *Trinova Corp.*, *supra*, the tax scheme challenged here unquestionably "export[s] tax burdens and import[s] tax revenues." 111 S.Ct. at 829.

2. New York also violates due process of law by taxing one person, a nonresident taxpayer, in part on the basis of income belonging to another person, the taxpayer's nonresident spouse, with whom the State lacks any due process contact. The State persists in including spousal income in the taxing formula even though it now admits—having declined to appeal the Appellate Division's due process ruling in petitioners' favor—that it has no nexus with the spouse or with the income the spouse earns outside New York. We are aware of no other instance where a court has upheld the constitutionality of such a scheme.

The Court of Appeals theorized that New York can constitutionally compel a married nonresident taxpayer to use the couple's combined income in calculating the former's New York tax by reason of the family's overall "ability to pay." App. 7a. This rationale is wholly unconvincing as applied to a person outside the state's taxing jurisdiction. New York admits that it has no due process contacts with the nonresident spouse and cannot compel the spouse to join the taxpayer's return. That being so, the Due Process Clause makes the spouse's "ability to pay" impermissible as a determinant of the taxpayer's tax.

The reality is that the spouse's income is not the taxpayer's income. The filing of a joint federal tax return does not convert the separate incomes of each spouse into joint property of both. *In re Wetteroff*, 453 F.2d 544, 547 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972) ("Congress most definitely did not intend [26 U.S.C.] § 6013(a) to affect or change the ownership of property rights between taxpayers."); *Willcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521 (Pa. 1947) (statute violated due process by converting

separate income of each spouse into community property of both). New York therefore denies due process of law by measuring the tax on a nonresident's income by the separate and unrelated income of that person's nonresident spouse.

3. In sustaining the challenged tax, the majority in the court below relied principally upon *Maxwell v. Bugbee*, 250 U.S. 525 (1919), and its limited progeny. That was error for at least three reasons. First, *Maxwell* involved a privilege tax, not a tax on income. Second, even if *Maxwell* could constitutionally be extended to income taxes, it cannot possibly justify taxing spousal income with which the State concededly lacks due process nexus. Third, however *Maxwell* is construed, that case is inconsistent with the Court's modern jurisprudence and should be confined to its facts if not overruled.

In *Maxwell* the Court considered the constitutionality of a New Jersey graduated tax on the privilege of inheriting, from a nonresident decedent, property located in the state. The tax was assessed by first calculating what the tax would be if applied to the entire estate, and then multiplying that tax by "the proportion which the specified local property bears to the entire estate of the decedent." *Maxwell*, 250 U.S. at 539. The five-justice majority held that this mode of computation did not violate the Due Process Clause (*id.* at 539-540):

> The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. . . . To say that to apply a different rule regulating succession to resident and nonresident decedents is to levy a tax upon foreign estates is to distort the statute from its purpose to tax the privilege [of inheritance], which the statute has created.

> into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it.

In short, the Court rested its determination upon the form of the tax as one on the privilege of inheritance, as distinguished from a tax imposed directly on property.

Justice Holmes, joined by three other justices, dissented. He explained (250 U.S. at 544):

> New Jersey cannot tax the property of [the decedents] outside the state, and cannot use her power over property within it to accomplish by indirection what she cannot do directly. It seems to me that that is what she is trying to do, and therefore that the judgment of the court of errors and appeals should be reversed.
>
> It seems to me that when property outside the state is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other states.

Maxwell is inapposite here because it involved neither a tax specifically on income nor a tax more generally on property. Quite the contrary, the key to the majority's reasoning was that the state had imposed a privilege tax that could properly be measured by the proportion of the privilege exercised in the state. New York, by contrast, has imposed a tax not on a privilege at all but directly on a species of property—"taxable income which is derived [by nonresidents] from sources in this state." Tax Law

§ 601(e). The tax should therefore be measured solely by the thing being taxed: the income from New York sources.

Second, even if *Maxwell* permitted New York to look to the nonresident's out-of-state income in calculating his tax, the decision in no way supports sweeping the non-New York income of the taxpayer's nonresident spouse into the tax calculation. The spouse is a separate person, and his or her income is not the property of the taxpayer even if they file a joint federal tax return. It is only the couple's federal tax return that is joint, not the income reported on the return.

In any event, *Maxwell* is no longer good law. It is premised upon a formalistic analysis of the state tax rather than an appraisal of its economic substance. In the intervening seven decades, the Court's Due Process and Commerce Clause jurisprudence has repeatedly rejected a focus upon a tax's form, looking instead to economic realities and the practical effects of the tax. For example, in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), the Court overruled three prior cases, stating that in the Court's "more recent decisions," it has "rejected th[e] somewhat metaphysical approach" of "focus[ing] on the character of the privilege [being taxed] rather than the practical consequences of the tax." 483 U.S. at 294-95 (footnote omitted). Similar reasons underlay *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), which overruled *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); *Western & Southern Life Ins. Co. v. Bd. of Equalization*, 451 U.S. 648 (1981), which overruled *Lincoln National Life Ins. Co. v. Read*, 325 U.S. 673 (1945); and *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), which overruled *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). *See Trinova Corp.*, 111 S.Ct. at 828 (noting that due process principles are comprised within the *Complete Auto Transit* analysis). As the dissent recognized below, the "significance [of these cases] is not their specific holdings but the methodology employed by the Court

in analyzing the statutes: *i.e.*, looking to the practical effect and economic realities of the tax in issue." App. 12a n.1.

Maxwell, on the other hand, was a five-to-four decision in which the Court focused upon the form of the tax as a "privilege" rather than a "property" tax. The Court itself long ago questioned the decision in that case. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1925) (*Maxwell* "is on the borderline, as is evidenced by the dissent of four members of the court"). *Maxwell* has rarely been cited by the Court and repeatedly been criticized by commentators.[11] As the dissent below recognized, it is Justice Holmes's dissent in *Maxwell* that points the way to the Court's modern jurisprudence (App. 14a):

> Consistent with Justice Holmes' pragmatic approach, in the past half century, the Supreme Court has moved away from earlier reliance on the *Maxwell*-type of formalism and embraced a method of analysis based on "the practical effect of a challenged tax" . . . and on "economic realities" rather than "formal phrasing."

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11 Professor Lowndes in 1936 found it difficult "to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation." C.L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 HARV. L. REV. 756, 770 (1936). A leading contemporary commentator has criticized *Maxwell* as being based on "dubious logic." W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. 1309, 1317 n.53 (1974). Moreover, the only decision in this Court to follow *Maxwell—Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937)—was also decided by a narrow vote (4 to 3) and has been described as "primarily involving the states' police power to regulate the growth of chain stores." Hellerstein, *supra*, 72 MICH. L. REV. at 1317 n.53.

The Court of Appeals plainly failed to adopt this pragmatic approach here.[12]

Even though *Maxwell* has been criticized and is contrary to the Court's more modern decisions, a handful of state courts that have looked at tax methodologies similar to New York's have

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12 In citing *Maxwell* for the proposition that "property not itself taxable can be used as a measure of the tax imposed upon property within the State" (App. 8a), the Court of Appeals again departs from the reasoning of this Court's modern cases. The "measurement of income" rationale is a mainstay of this Court's decisions involving the apportionment of a corporation's "unitary business" income. *See, e.g., Allied-Signal, Inc. v. Director, Division of Taxes*, 112 S.Ct. 2251 (1992). These decisions regularly explain that a state properly may use out-of-state income as one component in a formula designed to measure what a corporation's in-state income *is*. Once the state's apportioned share of the unitary income is determined, the state applies its ordinary corporate rates thereto to determine the tax. This type of "measurement" rationale is plainly inapplicable here. There is no uncertainty whatever about what petitioners' New York source income is. New York is not simply using out-of-state income in an apportionment formula; it requires nonresidents to compute *a tax* on their out-of-state income, then apportions part of *the tax* to New York. Rather than limiting apportionment to determination of the income subject to tax, New York is unconstitutionally apportioning a tax that petitioners' domiciliary states alone are entitled to levy. New York thereby subjects nonresidents to higher marginal tax rates than are borne by residents with identical New York source income, a discriminatory effect that does not occur where corporate income is apportioned by formula.

relied, erroneously, on the *Maxwell* line of cases.[13] A decision that is "borderline" at best should not be left standing, especially where it continues to serve as precedent impinging on the constitutional rights of a significant number of people who, at the same time, are excluded from the political process.

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13 In *Wheeler v. State*, 249 A.2d 887 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969), and *Wheeler v. State*, 253 A.2d 136 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969), the court applied *Maxwell* without addressing the distinction between a privilege tax, as in *Maxwell*, and the income tax at issue. The *Wheeler* cases were decided eight years before this Court overruled *Spector Motor Service* in *Complete Auto Transit*; and they involved a single taxpayer, so that no issue concerning spousal income was presented. The court in *Stevens v. State Tax Assessor*, 571 A.2d 1195 (Me.), *cert. denied*, 111 S.Ct. 65 (1990), blindly followed *Wheeler* concerning the applicability of *Maxwell* and did not consider this Court's intervening decisions in *Complete Auto Transit*, *Commonwealth Edison*, *Western & Southern Life*, or *American Trucking*. Although the returns at issue in *Stevens* were jointly filed by the nonresident taxpayer and his nonresident wife, the case did not concern a constitutional challenge to the inclusion of spousal income in the apportionment calculation, since the taxpayer had the option under Maine's statute to file either individually or jointly. ME. REV. STAT. ANN. tit. 36, § 5221(2). *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), was a Supremacy Clause decision concerning § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 574. The court referred to *Maxwell* and *Great Atlantic & Pacific Tea Co.* merely to reflect that Congress was aware, when it enacted the Act, of the tax methodology at issue here. The court did not rule on the constitutionality of the methodology. *Cf. Aronov v. Secretary of Revenue*, 371 S.E.2d 468 (N.C. 1988) (nonresident required to reduce in-state partnership net operating loss by amount of other out-of-state income).

4. The decision of the Court of Appeals also conflicts with prior decisions of the Court concerning the Privileges and Immunities Clause. It states:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This clause entitles the citizens of each state in the Union to enjoy in every other state all of the privileges and immunities which that second state accords its own citizens. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

In the early case of *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870), the Court explained that the term "privileges and immunities" is to be afforded a "very comprehensive meaning," specifically including the right "to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." Thus, under the Privileges and Immunities Clause, the Court will strike down as unconstitutional a state taxing scheme unless it in fact provides "substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers." *Austin v. New Hampshire*, 420 U.S. 656, 665 (1975). *See Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (invalidating a New York tax statute that denied to nonresidents an exemption from income taxation that New York provided to its residents).

The statute challenged here clearly discriminates against nonresidents. Its methodology has the net effect of reducing the value to nonresidents of exemptions and deductions, the full value of which is available to residents. Under § 601(e), a nonresident

receives only that proportion of the benefit of exemptions and deductions as is reflected in the apportionment formula.[14]

The statute is likewise discriminatory in that it permits a resident who is married to a nonresident the option of filing a separate return—based solely upon the resident's income—while denying that option to a nonresident who is married to a nonresident. By such disparate treatment that uniformly disadvantages nonresidents, New York has failed "'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988), *quoting Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).[15]

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14 A leading commentator on state taxes has explained, "Since the amount of income a resident earns plays no role in determining whether he receives a full exemption, it should not play any role in determining whether a nonresident receives a full exemption." W. Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. at 1343.

15 New York's refusal to permit a married nonresident taxpayer to file a separate return reflecting his or her sole income is partially responsible for the due process violation discussed earlier. For a brief period following the Appellate Division's due process ruling in petitioners' favor, the Department of Revenue took the position that the Appellate Division decision mandated offering a "separate filing" option to nonresident taxpayers whose nonresident spouses had no New York income. After the decision of the Court of Appeals, however, the Department abrogated that approach, requiring such nonresidents to report the federally reported joint data, although exempting the spouse from being required actually to sign the New York return.

5. The question presented is extremely important in a practical sense. At least nine states now tax nonresidents based upon the jointly reported incomes of the taxpayer and his or her spouse.[16] Routinely, they achieve this result through the interaction of the requirements that: (1) taxpayers must first calculate a tax on their income from all sources, which tax is then "apportioned"; and (2) married nonresidents who file a joint federal return must also file a joint state return, even when one spouse has no due process contacts whatever with the taxing state.[17] At least five additional states require taxpayers to employ the "apportionment" calculation above, while granting nonresidents the option to file a separate or a joint return.[18] Thus, a significant number of states, albeit a minority, employ tax methodologies similar to the one at issue here.

The constitutional question here is significant and growing in its importance to the field of state taxation. Professor Hellerstein has written that the tax status of the nonresident taxpayer today "is often characterized by uncertainty, unfairness, and considerable confusion."[19] New York's 1987 amendment and similar recent

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16 In addition to New York, at least Colorado, Kansas, Minnesota, Missouri, Nebraska, Ohio, Rhode Island, and Utah require joint filing.

17 This compulsory joint state filing was invalidated as to New York on due process grounds by the Appellate Division. App. 20a. The State did not appeal that ruling.

18 The additional states are California, Iowa, Maine, Vermont, and Virginia.

19 W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. at 1311.

legislation in other states have merely compounded the uncertainty, unfairness, and confusion.

Unless the decision below is reviewed, the number of states using New York's approach can be expected to grow. In the current economic environment, states are seeking politically expedient ways to increase their revenues to cover budget shortfalls resulting from the recent recession. New York's approach, if left standing, will encourage other states to reach beyond their borders in an effort to increase tax revenues at the expense of commuters and other persons who do not vote in the state. Such taxes have considerable revenue potential. New York's scheme for taxing nonresidents, estimated in 1989 to raise $50 million per year, has apparently yielded $80 million in additional tax annually, and comparable legislation currently being considered by New Jersey would raise an estimated $27 million per year.[20] The number of people affected by such taxes is substantial: approximately 460,000 nonresidents pay income taxes to New York alone.

The question presented is also important in an institutional sense. If states are successful in raiding their neighbors' coffers, the risk of retaliatory taxation and other measures detrimental to comity among the states is quite substantial. Indeed, the risk of a tax war has been amply realized in this case.

The Commonwealth of Pennsylvania expressed its concern by appearing before the Appellate Division in this case as amicus curiae supporting petitioners. Following New York's 1987 amendment of its law, the members of the New Jersey Assembly sued unsuccessfully in federal court to enjoin the new scheme of nonresident taxation. *See Hardwick v. Cuomo*, 891 F.2d 1097 (3d Cir. 1989). In June 1989, Governor Cuomo wrote Governor Kean

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20 *See* N.Y. Times, Feb. 16, 1989, at A1; *State Tax Notes* 708 (Mar. 29, 1993).

of New Jersey to advise him that changes to the New York tax law would soon be proposed, conceding that there are "elements of our massive tax reform program which we believe to be unfair to our nonresident taxpayers" and that further changes would be required before New York could be said to "treat nonresident taxpayers as fairly as we treat our own residents."[21] No such changes were ever made, and the New Jersey Assembly subsequently appeared before the Court of Appeals in this case as amicus curiae supporting petitioners. Since then, both houses of the New Jersey Legislature have passed bills that "retaliate against New York's tax on nonresident commuters" by adopting a similar methodology. *State Tax Notes* 708 (Mar. 29, 1993). Significantly, the New Jersey Senate also passed a bill which would rescind the new retaliatory tax if New York were to repeal the statute challenged in this case. *Id.*

The question presented here is also of importance to the Federal Government and to our military personnel stationed around the Country. In *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), the Tenth Circuit was called upon to interpret § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 574, which forbids a state to tax military pay earned by nonresident service personnel stationed in the state. Relying on *Maxwell v. Bugbee*, the court held that Kansas could nevertheless include military pay in an income tax formula similar to New York's, rejecting the Federal Government's arguments to the contrary.

This case presents an appropriate and necessary occasion for the Court to remove, or restrict, a decision of dubious continuing value. *Maxwell* was decided nearly three-quarters of a century ago. The economy, the mobility of workers, and the tax structure

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21 Letter, Hon. Mario M. Cuomo to Hon. Thomas H. Kean, dated June 6, 1989, an exhibit before the trial court (page 206 *et seq.* in the Consolidated Record on Appeal before the Court of Appeals).

have greatly changed since 1919. State income taxes, not to mention commuter taxes, were uncommon when *Maxwell* was decided; and the frequency of both spouses working outside the home has increased dramatically since that time. The willingness of some state courts to rely upon *Maxwell*'s outmoded logic warrants its express reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: April 21, 1993

David H. Weinstein
Robert S. Kitchenoff
Lindsey B. Slaughter
Kohn, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107

Albert G. Lauber, Jr.
Caplin & Drysdale
Chartered
One Thomas Circle, N.W.
Washington, D.C.

Scott H. Mustin
LaBrum & Doak
1818 Market Street, Suite 2900
Philadelphia, PA 19103

Joseph H. Einstein
Goodkind, Labaton,
Rudoff & Sucharow
122 East 42nd Street
New York, NY 10168

Attorneys for Petitioners

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . .

The Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Pertinent Portions of Section 601(d) of the New York Tax Law:

> Tax on certain unearned income. (1) For taxable years beginning after nineteen hundred eighty-six and before nineteen hundred eighty-nine, there is hereby imposed for each taxable year on the New York unearned income of every resident individual who has New York adjusted gross income in excess of one hundred thousand dollars, other than a resident married individual who makes a separate return under sub-section (b) of section six hundred fifty-one, a tax computed as follows. Multiply the New York unearned income of such individual by a rate determined by multiplying the applicable percentage set forth in paragraph three of this subsection by a fraction the numerator of which is the lesser of one hundred thousand dollars or the excess of such taxpayer's New York adjusted gross income over

one hundred thousand dollars and the denominator of which is one hundred thousand dollars.

* * * *

(3) The applicable percentage is, for taxable years beginning in nineteen hundred eighty-eight, two percent and for taxable years beginning in nineteen hundred eighty-seven, three percent.

* * * *

(8) For purposes of this subsection, the New York unearned income of a nonresident shall be computed using only those items derived from or connected with New York sources.

Pertinent Portion of Section 601(e) of the New York Tax Law:

Nonresidents and part-year residents. (1) There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident individual and trust and every nonresident estate a tax which shall be equal to the tax computed under subsections (a) through (d) of this section, as the case may be, reduced by the credits permitted under subsections (b) and (c) of section six hundred six, as if such nonresident or part-year resident individual, estate or trust were a resident, multiplied by a fraction, the numerator of which is such individual's, estate's, or trust's New York source income determined in accordance with part III of this article and the denominator of which is such individual's, estate's or trust's federal adjusted gross income for the taxable year . . . .

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

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3 No. 277
Lawrence J. Brady, et al.,
Appellants, OPINION

v.

The State of New York, et al.,
Respondents.

[Decided December 22, 1992]

David H. Weinstein, for appellants.
Daniel Smirlock, for respondents.
New Jersey State Assembly, amicus curiae

KAYE, J.:

Plaintiffs Lawrence Brady and Barbara Brady are married and reside in New Jersey. Plaintiffs Deborah Labovitz and Judah Labovitz are married and reside in Pennsylvania. At all relevant times, Lawrence Brady and Deborah Labovitz earned income in New York, and Barbara Brady and Judah Labovitz earned income outside New York; in addition, the Labovitzes had a combined adjusted gross income of more than $100,000 and received unearned income from non-New York sources. Both couples filed joint federal tax returns. Plaintiffs challenge New York's method of determining the nonresident tax on income earned in New York, whereby New York takes into account both New York and non-New York source income in calculating the tax rate to be applied to New York income.

The laws at issue are Tax Law §§601(d) and 601(e), sections of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28) (TRARA). Under Tax Law §601(e)(1), the tax of a nonresident is first calculated "as if the taxpayer were a resident." Thus, the nonresident's tax base (as that term is used by the parties) is determined by applying the appropriate graduated rate in Tax Law §601[a]-[c] to the taxpayer's total income from all sources (less any statutory deductions and exemptions [Tax Law §§606, 611[a]]).[1] the taxpayer's total income is derived from "New York adjusted gross income" (Tax Law §611[a]), which is determined by reference to the taxpayer's "federal adjusted gross income" (Tax Law §612).

Residents pay their entire tax base. For nonresidents, however, the amount is reduced by the percentage of income earned in New York compared to total income (Tax Law §601[e][1]). Therefore, while residents and nonresidents with the same total income are taxed at the same rate, the nonresident pays tax only on the percentage of income attributable to New York.

Assuming, for example, an effective tax rate of 6% for incomes of $25,000 or less, and an effective tax rate of 7% for incomes above $25,000, a resident with total income of $50,000 would have a tax base of $3,500 and would pay that amount. So

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1. In the trial court and Appellate Division, plaintiffs also challenged Tax Law §651(b)(2), which required married nonresidents to file a joint nonresident tax return in New York if they filed a joint federal return. The Appellate Division found this provision unconstitutional, as it exposed a nonresident spouse with no New York connections to civil and criminal liability in New York by virtue of that spouses's signature on the State tax return. The State has not appealed that determination. the question before us—whether in fixing the tax rate, New York can refer to spousal income included in the total adjusted gross income on the couple's joint federal return—is unaffected by that holding.

would a nonresident with the same income entirely attributable to New York sources. However, a nonresident with $25,000 of New York income and $25,000 of non-New York income, while having the same $3500 tax base, would pay half that amount—$1750—because only half of the income would be subject to the New York tax.

In addition, in 1988 only, the taxpayer's effective rate was increased with reference to unearned income if the taxpayer had New York adjusted gross income over $100,000 (Tax Law §601[d]). Thus, the hypothetical resident taxpayer with a total 1988 income of $110,000, including total unearned income of $10,000 from non-New York sources, would have an initial tax base of $7700. That tax base would be increased by $20, which is derived by multiplying $10,000 by 2% and then multiplying the resulting figure of $200 by (110,000-100,000)/100,000. A resident with such income would be liable for a tax of $7720. A nonresident, however, would pay only $7025, since the nonresident's tax based would be apportioned by the percentage of New York income (here 100,000/110,000 or 91%).

Plaintiffs challenge this tax scheme, complaining that New York unconstitutionally disadvantages nonresidents. They urge us not to compare residents and nonresidents of the same total income, but to look only to New York income in reviewing the legality of the tax rate. Thus, plaintiffs argue, the same tax rate must apply to a resident with total income of $25,000 and a nonresident with new York income of $25,000 regardless of the nonresident's total income reported on the tax return.

Plaintiffs seeks a declaration, for themselves and a class of similarly situated persons, that these provisions violate due process because presumably higher taxes arising from higher tax rates demonstrate that New York is in effect impermissibly taxing out-of-state income. They also claim the scheme violates the constitutional Privileges and Immunities and Equal Protection Clauses since a New York resident having no income other than

New York earnings may pay a lower tax than a nonresident with the same New York earnings who has additional income from other sources.

Supreme Court denied plaintiffs' motion for class certification and granted defendants' motion for summary judgment dismissing the complaint. The Appellate Division modified by declaring Tax Law §651(b) unconstitutional and remitting for further proceedings on that issue, but otherwise affirmed. On plaintiffs' appeal from the Appellate Division order, we now affirm.[2]

I.

Plaintiffs first claim that by setting tax rates with reference to adjusted gross income, New York taxes non-New York income, thus taking property in violation of due process. They point to three instances: (1) income of the nonresident taxpayer earned outside New York and included on the taxpayer's federal return; (2) income of the nonresident spouse earned outside New York and included on the taxpayer's joint federal return; and (3) for 1988 only, unearned out-of-State income referenced for purposes of the §601(e) surcharge on those with a total adjusted gross income over $100,000. Each of these is included in the tax base solely for purposes of rate determination. Thus, the inquiry with respect to

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2. Our decision on the merits renders it unnecessary to address the denial of class action status insofar as it relates to the claims at issue on this appeal. With respect to the Appellate Division's determination that §651(b)(2) is unconstitutional—which is not before us on the merits—both the motion court and the Appellate Division found plaintiffs had not met their burden of establishing that the proposed class action would be superior method for determining the controversy, pointing particularly to notification burdens weighed against speculative allegations of injury to the putative class. We see no reason to overturn that conclusion.

each category is the same: in these circumstances, is out-of-state income being impermissibly taxed?

We start with the proposition that legislative enactments enjoy a presumption of constitutionality (Montgomery v Daniels, 38 NY2d 41, 54). States, of course, have the power to tax nonresidents on income derived from sources within their borders (Travis v Yale & Towne Mfg Co, 252 US 60, 75; Shaffer v Carter, 252 US 37, 52). Similarly, progressive tax systems, which apportion the tax burden based on the taxpayer's ability to pay, are unquestionably constitutional (Brushaber v Union Pacific, 240 US 1, 25), and indeed are "widespread in the United States and imbedded in the federal tax structure" (Wheeler v Vermont, 249 A2d 887, 890 [Vt], appeal dismissed for want of a substantial federal question 396 US 4[3]).

It has long been the rule that states may refer to non-taxable out-of-state assets in setting their rates for taxable assets (see Great Atlantic and Pacific Tea Co v Grosjean, 301 US 412; Maxwell v Bugbee, 250 US 525). Maxwell involved a New Jersey inheritance tax that required the inclusion of the entire estate of the decedent, wherever located, to determine the rate by which the New Jersey property would be taxed. The actual tax was calculated, as here, by applying the rate applicable to the entire estate, but then reducing the tax to reflect only the percentage of the estate located in New Jersey. The United States Supreme Court found the statute constitutional, holding:

> The subject matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of

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3. Dismissal for want of a substantial constitutional question operates as a decision on the merits (see, Washington v Yakima Indian Nation, 439 US 463, 476 n20).

> the tax imposed * * * In the present case, the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent * * * It is in no sense a tax upon the foreign property.

(Id. at 539.) Similarly, in Grosjean, the Supreme Court upheld a Louisiana license tax on in-state chain stores that was calculated on the basis of the taxpayer's nationwide operation, stating "[i]n legal contemplation, the state does not lay a tax upon property lying beyond her borders * * * " (id. at 425).

Since Maxwell and Grosjean, high courts in other states have upheld tax schemes similar to the one at issue here. (See, Stevens v State Tax Assessor, 571 A2d 1195 [Me], cert denied 111 S Ct 65; Wheeler v State, 249 A2d 887, supra; cf. United States v Kansas, 810 F2d 935 [10th Cir] [upholding validity of including nonresident military income--which was not taxable by state--in determining state tax rate]; Aronov v Secretary of Revenue, 371 SE2d 468 [NC] [upholding requirement that nonresident taxpayer reduce net operating loss from NC partnership by amount of out-of-state income], cert denied 489 US 1096.)

As in Stevens and Wheeler, the subject matter here regulated is a tax on in-state income, which is within the jurisdiction of the State. When the state levies taxes within its authority, "property not itself taxable can be used as a measure of the tax imposed upon property within the State and * * * to do so 'is in no just sense a tax on the foreign property.'" (United States v Kansas, 810 F2d at 938, supra [quoting Maxwell v Bugbee, 250 US at 539, supra].)

Plaintiffs' contention that Maxwell and Grosjean have been superseded by Supreme Court cases dealing with business taxation and interstate commerce is without basis. Those cases address the

constitutionality of directly taxing multi-state corporate income, which turns upon whether such income is attributable to a "unitary" business with a sufficient nexus in the taxing state to justify the exercise of the state's taxing authority. In Allied-Signal, Inc v Director, Division of Taxation (60 USLW 4554 [June 15, 1992]), for example, the issue was whether New Jersey could tax the capital gain realized by a non-New Jersey company on the sale of a New Jersey company. Similarly, Complete Auto Transit, Inc v Brady (430 US 274) and its progeny address whether a state can tax interstate corporate income in exchange for the privilege of carrying on its business. As even the dissent acknowledges (dissent p 3, n1), neither line of cases controls the present issue. Here, there is no question about which of the jointly reported income is taxable and which not; the question is how to determine the rate on income clearly subject to New York tax.

Thus, plaintiffs' due process challenge was correctly rejected by the courts below.

II.

Plaintiffs' alternative contention—an undifferentiated argument under the constitutional Privilege and Immunities and Equal Protection Clauses—also was properly rejected: TRARA treats similarly situated residents and nonresidents the same.

The Privilege and Immunities clause of the United States Constitution was designed "'to place the citizens [including residents] of each State upon the same footing with citizens [and residents] of other States, so far as the advantages resulting from citizenship in those states are concerned.'" (Supreme Court of Virginia v Friedman, 487 US 59, 64, quoting Paul v Virginia, 8 Wall 168, 180; see also, Austin v New Hampshire, 420 US 656.) Pursuit of an occupation outside one's home state is certainly a right protected by this clause (see, Hicklin v Orbeck, 437 US 518, 524-525; Austin v New Hampshire, 420 US 656, Toomer v Witsell, 334 US 385, 396). However, to establish an unwarranted

burden on their privileges and immunities, plaintiffs must demonstrate disadvantage as against others in a similar position (Stevens v State Tax Assessor, 571 A2d at 1195, supra; Wheeler v State of Vermont, 249 A2d at 891, supra). This they have failed to do. (Compare, Austin v New Hampshire, 420 US 656 [taxing nonresidents but not residents violates privileges and immunities]; Spencer v South Carolina Tax Commission, 316 SE2d 386 [SC] [statute that denied certain deductions only to nonresidents violated privileges and immunities], aff'd by an equally divided Court 471 US 82.)

Plaintiffs would have us compare them to New York residents with a total income equivalent to plaintiffs' New York income alone. Plaintiffs would urge, for example, that a nonresident earning $20,000 in New York, but with reported income of $100,000, should be taxed at the same rate as a resident with an income of $20,000. But plaintiffs' hypothetical taxpayers are not similarly situated in terms of ability to pay. Similarly situated taxpayers are those with the same total income.

Again, plaintiffs have failed to establish that the challenged tax is unconstitutional.

III.

Plaintiffs' real quarrel, in the end, is with the graduated tax. A system of progressive taxation apportions the tax burden based on ability to pay—higher income taxpayers can pay more and are therefore taxed at a higher rate than lower income taxpayers. This system does not implicate the State or Federal Constitution so long as the rates are applied, as here, in a nondiscriminatory manner and only to taxable New York income.

Finally, we note that the dissent is flawed not only in its reliance on recent Supreme Court decisions dealing with corporate tax (see, pp 8-9, supra), but also in its claim to logic, common sense and economic reality. In fact, those considerations—as well

as precedent—support the challenged tax, which has the practical effect of equalling tax rates among persons whose total incomes, as reported to taxing authorities, are the same.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

HANCOCK, J (dissenting):

No state may impose a tax on income earned outside of the state by a nonresident. That is settled constitutional law. Under the statute at issue, New York considers income earned outside of the State for purposes of determining the rate at which it will tax a nonresident's New York income. Because New York has a progressive tax rate structure, the result of including the out-of-state income is a higher tax rate and a higher tax on the New York income. The question in this case is whether by considering the nontaxable out-of-state income in determining the tax rate on the New York income, the State is, in reality, taxing the out-of-state income and doing indirectly what it cannot do directly.

The answer to the question, of course, is the one dictated by logic and common sense: the State is taxing the outside income. Including it results in a higher tax bracket and the nonresident pays more tax on the New York income. But, the State maintains that this is not so. There is a distinction, it says, which "is straightforward and obvious. State taxes on nonresidents may be measured by income outside the state as long as they are not imposed on such income" (Respondents' brief, at 17 [emphasis added]).

While the claimed distinction between taxing out-of-state income and using it as a measure of the tax that is ultimately imposed hardly seems "straightforward" or "obvious", my

colleagues are apparently content with it and find satisfactory precedent in two decisions of the Supreme Court -- one handed down seventy-three years ago, Maxwell v Bugbee (250 US 525), and the other fifty-five years ago, Great Atlantic & Pacific Tea Co. v Grosjean (301 US 412). I believe that these decisions do not control this case. They do not reflect the Supreme Court's express rejection of labelling and formalism and its adoption instead of economic reality as the current approach to problems involving state taxation of out-of-state income of nonresidents (see, e.g., Mobil Oil Corp. v Commissioner of Taxes, 445 US 425, 440-441; Complete Auto Transit, Inc. v Brady, 430 US 274, 279).[1] For this reason, I respectfully dissent.

The case of Maxwell v Bugbee (250 US 524)—the basis of the Attorney General's "straightforward and obvious" distinction between measuring a tax on out-of-state income and taxing out-of-state income—was decided in 1919 by a vote of five to four.[2] The Maxwell majority, adopting the more formalistic approach of that time, dismissed the due process objection to the inclusion of out-of-state property in determining the tax on the privilege of transferring property within the state. It simply announced,

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1. That these cases address the extraterritorial reach of corporate taxes, as the majority notes (Maj opn, at 8), is of no moment. Their significance for present purposes is not their specific holdings but the methodology employed by the Court in analyzing the statutes: i.e., looking to the practical effect and economic realities of the tax in issue.

2. Great Atlantic & Pacific Tea Co. v Grosjean (301 US 412), involving a chain store tax based on the total number stores in the chain, is cited by the majority but is not discussed in the opinion. It adds nothing to the argument (see, Hellerstein, Some Reflections on the State Taxation of a Nonresident's Personal Income, 72 Michigan Law Review 1309, 1317 n 53 [Grosjean "may be viewed as a case primarily involving the state's police power to regulate the growth of chain stores"]).

without explanation of its reasoning, that the inclusion of the out-of-state property does not result in a tax on it, but "merely affords a measure of the tax imposed" (Maxwell, supra, at 535).

The soundness of the Maxwell decision has been questioned by the Court itself (see, Frick v Pennsylvania, 268 US 473, 495 [Maxwell "is on the borderline, as is evidenced by the dissent of four members of the Court"]; see also, Hellerstein, Some Reflections On the State Taxation of a Nonresident's Personal Income, 72 Michigan L Rev 1309, 1317 n 53 [Maxwell riddled with "dubious logic"]; Lowndes, Rate and Measure in Jurisdiction To Tax—Aftermath of Maxwell v Bugbee, 49 Harv L Rev 756, 770 [it is difficult "to imagine anything more iniquitously unfair than the application of the Maxwell formula to income taxation"]).

Justice O. W. Holmes, Jr., viewing the substance of the statue in Maxwell and its effect on the taxpayer with the frank realism for which he was noted,[3] dissented. Joined by Chief

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3. See, e.g., Holmes, Path of the Law, 10 Harv 1 Rev 457; Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought, 66 Cornell L Rev 861, 866-869; Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 Cornell Law Quarterly 568; Hantzis, Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr., 82 Northwestern Univ L Rev 541; Lyons, Legal Formalism and Instrumentalism, 66 Cornell L Rev 949 (Professor Lyons writes at p. 949: "Holmes and those who followed in his wake believed they were rejecting a frigid and impoverished conception of the law [often called 'formalism'] which had, in their view, adversely affected judicial practice. They spawned a collection of doctrines that Professor Summers dubs 'pragmatic instrumentalism'—fittingly so-called both because they viewed the law as an eminently practical instrument and because they were so strongly influenced by the philosophical pragmatists William James and John Dewey").

Justice White and Justices VanDevanter and McReynolds, Justice Homes wrote:

> It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States (Maxwell, supra, at 544 [Holmes, J., dissenting] [emphasis added]).

Consistent with Justice Holmes' pragmatic approach, in the past half century, the Supreme Court has moved away from its earlier reliance on the Maxwell-type of formalism and embraced a method of analysis based on "the practical effect of a challenged tax" (Mobil Oil Corp, supra, at 443) and on "economic realities" rather than "formal phrasing" (Complete Auto Transit, supra, at 278-280 [overruling Spector Motor Service v O'Connor, 340 US 602, which had deemed "irrelevant any consideration of the practical effect of the tax"]; see also, Allied-Signal, Inc. v Director, Division of Taxation, 60 USLW 4554, 4556; ASARCO v Idaho State Tax Commission, 458 US 307, 319; Exxon v Wisconsin Dep't of Revenue, 447 US 207, 223-224; Wisconsin v JC Penny Co., 311 US 435, 444).

If the tax in question is analyzed with the candor employed by Justice Holmes in his Maxwell dissent and by the Supreme Court in its recent decisions, there can be no question that the practical effect of including out-of-state for the purpose of increasing the rate on the in-state income is a tax on the out-of-state income. The majority does not dispute this proposition. Instead, it cites state cases, which, with no explication, have accepted the Maxwell procedure of deciding by labelling (see, Maj Opn, at 7 [citing Stevens v State Tax Assessor, 571 A2d 1195

(Me); Wheeler v Vermont, 249 A2d 887 (Vt)]). That Vermont and Maine have cited Maxwell with approval, of course, does not mean that the decision is regarded with favor by the Supreme Court.[4] The Vermont Supreme Court, it should be noted, decided Wheeler in 1969, prior to the Supreme Court cases expressly renouncing the formalistic approach. In Stevens, the Supreme Court of Maine merely followed Wheeler in its uncritical acceptance of Maxwell. Whether the Court will again resort to the Maxwell-type of labelling[5] in order to uphold a taxing scheme—

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4. Indeed, the decision in Wheeler does not address the issue of whether out-of-state income is a permissible consideration in setting the rate of tax on in-state income (see, Hellerstein, Some Reflections on the State Taxation of a Nonresident's Personal Income, 72 Michigan L Rev 1309, 1318). The decision, as far as it concerned due process, addressed only whether the Vermont had in fact taxed Wheeler's out-of-state income.

5. Avoiding a due process challenge by proclaiming that the statute "merely affords a measure of the tax imposed" as in Maxwell is the sort of formalism in the decision-making which the Court repudiated in J.C. Penny (supra):

> [T]he descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." Henderson v Mayor of New York, 92 US 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that "in passing on its constitutionality we are concerned only with the practical operation, not its definition or the precise form of descriptive words which may be applied to it." Lawrence v State Tax Commission, 268 US 276, 280 (Wisconsin v J.C. Penny Co., 311 US at 443-444).

where out-of-state income of the taxpayer and the taxpayer's spouse is used to increase the tax on the taxpayer's in-state income —only the Supreme Court can tell us. If the answer should be "yes", then I respectfully submit that the answer would be inimical to Justice Holmes' common sense appraisal of the tax in Maxwell and to the Court's recent method of analyzing state taxation Due Process problems by looking at the practical effect and the economic realities rather than "formal phrasing" (Complete Auto Transit, supra, at 280; see e.g., Mobil Oil Corp., supra at 443). A statute which includes out-of-state income of the taxpayer and the taxpayer's spouse for the purpose of increasing the tax on the in-state income and which results in such increase imposes a tax on the out-of-state income in violation of the Due Process clause—no matter how the tax is described. To pretend that it does not endorses a Due Process violation and works a distinct unfairness on taxpayers such as the New Jersey and Pennsylvania residents in this case.

* * * * * * * * *

Order affirmed, with costs, and certified question answered in the negative. Opinion by Judge Kaye. Judges Titone, Bellacosa and Smith concur. Judge Hancock dissents and votes to reverse in an opinion. Acting Chief Judge Simons took no part.

Decided December 22, 1992

APPENDIX C

Lawrence J. Brady et al., Appellants, v State of New York et al., Respondents.

N.Y. Appellate Division, Third Department, November 27, 1991

[172 AD2d 17; 576 N.Y.S.2d 896]

OPINION OF THE COURT

Levine, J.

Plaintiffs Lawrence J. Brady and Barbara A. Brady are married and reside in New Jersey. Lawrence Brady was employed and earned income in New York in 1988. Plaintiffs Judah I. Labovitz and Deborah R. Labovitz are husband and wife and reside in Pennsylvania. During 1988, Deborah Labovitz was employed and earned income in New York. Neither Barbara Brady nor Judah Labovitz had any New York source income in 1988. The Labovitz couple had unearned income from non-New York sources and had combined adjusted gross income of over $100,000. Both couples filed joint Federal income tax returns for 1988. They have brought this action to challenge the validity of New York's income tax treatment of nonresident taxpayers.

Under Tax Law § 601(e)(1), New York imposes a tax "on the taxable income which is derived from sources in this state of every nonresident". Section 601(e) provides for what is essentially a two-step process to determine the tax due. First, a preliminary tax is calculated "as if such nonresident * * * were a resident" (Tax Law § 601[e][1]). For residents, that tax is determined by applying the appropriate tax rate to the taxpayer's New York taxable income" (Tax Law § 601[a]-[c]), adding any additional tax due on unearned income if the taxpayer had New York adjusted

gross income in excess of $100,000 (*see*, Tax Law § 601[d]) and deducting various statutory credits (*see*, Tax Law § 606). New York taxable income is derived from "New York adjusted gross income" (less deductions and exemptions) (Tax Law § 611[a]), and New York adjusted gross income is in turn derived from the taxpayer's Federal adjusted gross income (*see*, Tax Law § 612). Once the tax is thus initially fixed as though the nonresident was a resident taxpayer, it is then multiplied by a fraction, the numerator of which is the nonresident's New York income and the denominator of which is that person's Federal adjusted gross income, in order to arrive at the final tax due (*see*, Tax Law § 601[e][1]). Thus, as agreed to by all parties, the initial tax computation for the liability of a nonresident taxpayer takes into account the taxpayer's income from all sources, within and without the State, but the actual tax due is that fraction of the tax initially determined that is equivalent to the ratio of the taxpayer's New York income to total income. Because the State's income taxation system is based upon progressive rates, a New York resident having no income except New York earnings will pay less tax on those earnings than a nonresident having the same New York earnings plus additional income from non-New York sources.

One additional facet of the State income tax structure affects the tax paid by non-New York residents on their New York source income. Under Tax Law § 651(b)(2), nonresident taxpayers and their nonresident spouses, like resident taxpayers and their resident spouses, must file a joint State income tax return (thereby reporting their aggregate incomes) if they filed a joint Federal tax return. Contrastingly, if one of the spouses is a resident and the other is a nonresident, they may elect to file either separate or joint State income tax returns, irrespective of whether they filed a joint Federal return (*see*, Tax Law § 651[b][4]).

Plaintiffs in this action seek a declaration of the unconstitutionality of Tax Law § 601(d) and (e) and § 651 (b)(2), an injunction against the enforcement of those sections, and damages for loss of the use of their money paid for taxable years

1988 and thereafter in excess of what they would have paid had Lawrence Brady and Deborah Labovitz been permitted to file individual State tax returns reporting only their New York source incomes and had their respective tax rates been based solely on such New York source income. They allege that the enforcement of State income tax liability against them under those sections denied them substantive due process and equal protection under the 14th Amendment of the US Constitution, and violated the Privileges and Immunities Clause (US Const, art IV, § 2, cl 1) and the Commerce Clause (US Const, art I, § 8, cl 3). Plaintiffs brought this action as a class action on behalf of one plaintiff class, i.e., all nonresidents required to file a New York income tax return, and two plaintiff subclasses, i.e., (1) those members of the nonresident class who have no New York source income but who are compelled to file a joint New York income tax return with their spouses, and (2) those members of the nonresident class who are subject to the tax imposed by Tax Law § 601(d) upon unearned income from non-New York sources.

Plaintiffs sought disclosure by way of production of documents concerning, *inter alia*, State administrative and legislative deliberations regarding the taxation of nonresidents and concerning the actual fiscal impact of the changes in the system of taxing nonresidents from 1986 to 1988. Supreme Court granted protective orders as to the disclosure sought because it viewed the requests as overbroad and not relevant to the constitutional issues. Next, plaintiffs moved for an order pursuant to CPLR article 9 certifying that the action could be maintained as a class action. Supreme Court denied plaintiffs' motion on the ground, *inter alia*, that plaintiffs did not show that a class action against the State in this matter is superior inasmuch as the doctrine of stare decisis could be asserted against defendants in the future. Finally, defendants moved for summary judgment dismissing the complaint and plaintiffs cross-moved for partial summary judgment declaring Tax Law § 601(d) and (e) and § 651(b) unconstitutional. Supreme Court granted defendants' motion and denied plaintiffs' cross

motion. Plaintiffs appeal from all of the foregoing adverse determinations.

Because the resolution of the constitutional issues involved in this appeal necessarily will affect the disposition of the remaining procedural issues, we address first whether Supreme Court properly dismissed plaintiffs' challenges to the validity of the provisions of the Tax Law in question. In our view, there is merit to plaintiffs' due process objection to Tax Law § 651(b)(2). By virtue of that provision, a nonresident having no New York source income whatsoever is compelled to file a joint New York income tax return solely because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return for the same taxable year. Concededly, a person obligated to file a State tax return or one who is a signatory to a joint return is civilly liable for the tax obligation arising therefrom, plus penalties (*see*, Tax Law § 685), and may also be exposed to criminal liability (*see*, Tax Law §§ 1801, 1804). In *Miller Bros. Co. v Maryland* (347 US 340, 344-345) the United States Supreme Court held, with respect to a State's power to tax extraterritorially, that there was a settled "consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Out-of-State cohabitation with a spouse having New York income and filing a joint Federal income tax return with that spouse cannot constitute the necessary minimum connection for the extraterritorial exercise of New York's taxing power. Thus, we have concluded that Tax Law § 651(b)(2) violates due process insofar as it may be applied to require a nonresident spouse of a nonresident taxpayer to file a joint State tax return solely by reason of the marital relationship and the filing by the couple of a joint Federal income tax return.

The foregoing ruling regarding Tax Law § 651(b)(2) renders academic plaintiffs' constitutional challenges to the validity of Tax Law § 601(d) and (e) that were based upon the interaction of those sections with section 651(b)(2). The language of Tax Law

§ 601(d) and (e) is "marriage neutral." Once a nonresident spouse having no New York income is no longer obligated to file a joint return, the remaining sections of the Tax Law at issue here are not subject to the objection that they increase a nonresident taxpayer's State tax liability on the basis of the non-New York income of that taxpayer's nonresident spouse.

Plaintiffs nonetheless argue that Tax Law § 601(e) is unconstitutional even in the absence of the joint filing requirement of Tax Law § 651(b)(2). They claim that the section violates due process because its inclusion of the nonresident's non-New York income in the initial determination of the tax before applying the apportionment formula is the functional equivalent of a tax on that out-of-State income. Alternatively, they assert that section 601(e) discriminates against nonresident taxpayers in favor of New York residents, thereby offending the Privileges and Immunities Clause, Equal Protection Clause and Commerce Clause of the US Constitution. We disagree with both contentions.

The procedure for taxing the New York source income of a nonresident set forth in Tax Law § 601(e), by initially applying a progressive tax rate to the taxpayer's income from all sources and then apportioning to fix the final tax due, is a valid means, under due process, of using income not itself taxable as part of the measurement of the tax imposed on the nonresident's New York income (*see, Maxwell v Bugbee*, 250 US 525, 539; *see also, Atlantic & Pac. Tea Co. v Grosjean*, 301 US 412, 425). Indeed, statutory provisions for taxing the in-State income of nonresidents virtually identical to Tax Law § 601(e) have been upheld over due process and equal protection objections in several recent decisions (*see, United States v State of Kansas*, 810 F2d 935, *affg* 580 F Supp 512; *Wheeler v State*, 127 Vt 361, 249 A2d 887, *appeal dismissed for want of substantial Federal question* 396 US 4; *see also, Stevens v State Tax Assessor*, 571 A2d 1195 [Me], *cert denied* -- US -- , 111 S. Ct 65; *Aronov v Secretary of Revenue*, 323 NC 132, 371 SE2d 468, *cert denied* 489 US 1096). Plaintiffs simply have not demonstrated that, under Tax Law § 601(e), their

income from non-New York sources is used in any respect other than as a measurement of the tax due on New York income, that is, in determining the rate of taxation applied to their New York income. Thus, plaintiffs' due process objection to Tax Law § 601(e) fails.

Likewise, Tax Law § 601(e) is not discriminatory in counting a nonresident's income from New York sources to determine the appropriate tax rate to be applied to a nonresident taxpayer's New York income. As previously described, the applicable tax rate for both residents and nonresidents is derived in the same manner and from the same ultimate source, i.e., Federal adjusted gross income, generally constituting income from all sources. Resident and nonresident taxpayers similarly situated in terms of ability to pay taxes out of all sources of income are treated the same within the parameters of New York's progressive income taxation system. Clearly, New York has a substantial legitimate interest in uniformly enforcing its progressive income tax system. We are also unpersuaded by plaintiffs' claim that discrimination against nonresident taxpayers exists because apportionment under Tax Law § 601(e) to fix the final tax due dilutes the value of their deductions and exemptions, as compared to their value for resident taxpayers. To whatever extent application of the ratio of New York income to total income dilutes the value of exemptions and deductions for nonresidents, it does so in direct proportion to the reduction of the final tax due from nonresidents. This hardly demonstrates any discrimination in favor of resident taxpayers.

We also find meritless plaintiffs' challenge to Tax Law § 601(d). That section, by its own terms, does not apply directly to nonresident taxpayers. The unearned income of a nonresident does, however, enter into the calculation to arrive at the nonresident's tax liability under section 601(e), because the initial determination of tax is made "as if such nonresident * * * were a resident." Nonetheless, as the earlier discussion herein demonstrates, the inclusion of the additional tax on unearned

income in the computation performed pursuant to Tax Law § 601(e) merely serves to add marginally to the tax rate applied to the nonresident's New York income. We have already sustained the validity of that use of non-New York income in taxing the New York income of a nonresident taxpayer.

It follows from the foregoing that the dismissal of plaintiffs' complaint should be modified by reinstating the cause of action challenging the constitutionality of Tax Law § 651(b)(2) and declaring that Tax Law § 651(b)(2) is unconstitutional as applied to require the filing of a joint income tax return by a nonresident solely because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return. The matter must be remitted to Supreme Court on the issue of damages (*see, Shields v Katz*, 143 AD2d 743, 745; *see also, Cass v State of New York*, 58 NY2d 460, 463; *Weissman v Evans*, 56 NY2d 458).

This resolution of the substantive issues, in our view, further militates toward upholding Supreme Court's denial of class action certification. It was plaintiffs' burden to establish, *inter alia*, that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901[a][5]; *see, Askey v Occidental Chem. Corp.*, 102 AD2d 130, 137-138). The determinative constitutional issues regarding liability have now been resolved. Not only will the determination of the invalidity of Tax Law § 651(b)(2), as applied, be given stare decisis effect in any future litigation, but defendants have stipulated to being bound by it on all duly and timely filed administrative claims. Thus, the remaining unresolved issues for entitlement to monetary relief appear to be primarily personal to the individual members of the class of nonresident taxpayers, i.e., eligibility for a refund and the amount of overpayment.

The law in New York is settled that no cause of action lies for restitution of an unconstitutionally collected tax that was paid voluntarily (*see, Paramount Film Distrib. Corp. v State of New*

York, 30 NY2d 415, 420, *cert denied* 414 US 829; *Mercury Mach. Importing Corp. v City of New York*, 3 NY2d 418, 426). Therefore, entitlement to monetary relief will require some initiative on the part of the individual taxpayer, by way of protest or proper claim for a refund. For all the foregoing reasons, we agree with Supreme Court that the superiority of a class action over other available methods for resolution of the controversy involved in this litigation has not been established (*see, Conklin v Town of Southampton*, 141 AD2d 596, 597-598; *Gandolfi v City of Yonkers*, 101 AD2d 188, 198-199, *affd* 62 NY2d 995; *see also, Garden City Center Assocs. v Board of Assessors*, 153 AD2d 667, *lv dismissed* 75 NY2d 804; *Duffy v Wetzler*, 148 Misc 2d 459.

Lastly, as to the appeal from the discovery rulings of Supreme Court, our decision herein resolves the substantive issues regarding which plaintiffs sought discovery and, thus, obviates the need for such disclosure. Supreme Court's protective orders should, therefore, be affirmed.

MAHONEY, P.J., WEISS, YESAWICH, JR., AND MERCURE, JJ., concur.

Ordered that the order entered September 12, 1990 and judgment entered thereon are modified, on the law, without costs, by reversing so much thereof as granted defendants' motion dismissing the cause of action in the complaint challenging the constitutionality of Tax Law § 651(b)(2) and denied plaintiffs' cross motion on said cause of action; motion denied and cross motion granted on said cause of action, partial summary judgment awarded to plaintiffs, it is declared that Tax Law § 651(b)(2) is unconstitutional as applied to require the filing of a joint New York income tax return by a nonresident solely because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return, and matter remitted to the Supreme Court for further proceedings not inconsistent with this court's decision; and, as so modified, affirmed.

Ordered that the orders entered February 15, 1990 and judgments entered thereon are affirmed, without costs.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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LAWRENCE J. BRADY, BARBARA A. BRADY, DEBORAH R. LABOVITZ, and JUDAH I. LABOVITZ, Individually and on behalf of all Others Similarly Situated,

Plaintiffs,

- against -

MEMORANDUM DECISION

THE STATE OF NEW YORK, MARIO CUOMO, Governor of the State of New York, and JAMES WETZLER, Commissioner of Taxation and Finance of the State of New York,

Defendants.

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Supreme Court, Albany County Motion Term, February 27, 1990 (adjourned) and April 3, 1990

[Decided July 9, 1990]
Justice Daniel H. Prior, Jr., Presiding
(Motion #01-89-0181o8)

APPEARANCES:

For the Motion: Hon. Robert Abrams
Attorney General of the State of New York
Attorney for Defendants
David Fruchter, Esq., of Counsel

In Opposition and for the Cross-Motion: Goodkind, Labaton & Rudoff
Attorneys for Plaintiffs

PRIOR, J.:

Defendants bring a Motion, pursuant to CPLR § 3212, seeking an Order granting defendants Summary Judgment as to all the issues raised by plaintiffs in their Amended Complaint. Plaintiffs Cross-Move, pursuant to CPLR §§ 3212(e) and 2215, for an Order granting Partial Summary Judgment in favor of plaintiffs declaring §§ 601(d), 601(e) and 652(b)(2) of the New York Tax Law to be unconstitutional.

The above-captioned action was commenced by plaintiffs who are seeking Equitable and Declaratory Relief from the aforementioned Tax Law statutes on the ground that they are unconstitutional. In short, plaintiffs allege that §§ 601(d), and 601(e) and 651(b)(2) of the New York Tax Law are unconstitutional and that they are unconstitutional on their face and by operation of Law, they are violative of Due Process, deny plaintiffs Equal Protection of the law, abridge the privileges and immunities of citizens, violate the Supremacy Clause and violate plaintiffs federal rights. Their Amended Complaint seeks a statutory claim for damages, injunctive relief, declaratory relief and attorneys fees for this violation of plaintiffs rights under the United States Constitution and the New York Constitution. Plaintiffs have previously been denied preliminary injunctive relief and class action certification status by this Court.

Defendants allege in their Motion for Summary Judgment that plaintiffs challenge to the constitutionality of the statutes in question must be summarily dismissed as a matter of law as none of their contentions have any merit. In support of their Motion, defendants argue that, contrary to plaintiffs claims, the Tax Reform and Reduction Act of 1987, hereinafter referred to as "TRARA," imposes an income tax under which residents and non-residents alike are subject to the same underlying rates of taxation, credits, deductions and exemptions, and that in the case of non-residents, it taxes income derived from New York sources by utilizing apportionment (via a tax equation). Defendants also argue

that the illustration of an application of the 1988 income tax non-resident liability that is contained in the Amended Complaint is incomplete, incorrect and actually contradicts plaintiffs contentions. Defendants go on to show that no New York tax burden is imposed on the spouse (of a New York income earner) with no New York income by virtue of the joint filing requirements and that there is no discrimination against non-resident couples in the filing requirement of § 651(b)(2).

Plaintiffs, in turn, argue that §§ 601(d), 601(e) and 651(b)(2) are unconstitutional (reference is made to plaintiffs Memorandum of Law for a complete discussion of same) and that their cause of action is clearly established as a matter of law sufficient to entitle them to Partial Summary Judgment relative to the constitutionality issue.

The Court approaches this inquiry bearing in mind that a statute will be interpreted, if possible, so as to uphold its constitutionality and in accordance with its manifest intent and purpose. [Matter of Sarah K, 66 NY2d 223, 238]. That is because there is a simple, but well-founded presumption that an act of the Legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt. [Dorset v. Cultural Resources, 46 NY2d 358, 370]. This presumption of a tax statutes constitutionality can be overcome only by the most explicit demonstration that the challenged classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. [Trump v. Chu, 65 NY2d 20, 25; citing Madden v. Kentucky, 309 US 83].

The Court notes that both plaintiffs and defendants have submitted well-researched Memoranda of Law relative to their respective positions. Defendants offer the Affidavit of one John Hudder, Deputy Commissioner for Tax Policy Analysis for respondent State Department of Taxation and Finance. In his Affidavit, Mr. Hudder goes through a detailed analysis of the tax statutes in

question as they apply to the hypothetical situations presented in plaintiffs Amended Complaint and those presented in the Exhibits attached to said Affidavit. The conclusion reached in this Affidavit is that these statutes do not negatively impact upon persons similarly situated to the position of plaintiffs. The Court notes that plaintiffs do not controvert Mr. Hudder's analysis, but instead, rely on affidavits previously used in preceding Motions that do not specifically refer to Mr. Hudder's arguments, and also rely once again on their unconstitutionality arguments. In fact, all that plaintiffs themselves have to offer as to issues of fact are statements to the effect that they "may be placed in the position in future years of foregoing our federal right (to file a joint federal tax return) because of the burden on it which New York has imposed." As the Court will further discuss, plaintiffs failure to raise issues of fact will prove fatal to their causes of action.

As discussed in this Court's August 17, 1989 Memorandum Decision pertaining to plaintiffs Motion for a Preliminary Injunction, the fact patterns upon which plaintiffs base their claims are all hypothetical. Plaintiffs have consistently failed throughout this proceeding to allege specific facts as they explicitly apply to them as individuals. As mentioned in the preceding paragraph, plaintiffs have opted to refer to what may happen or how these laws may affect them tax-wise, but offer no real facts. They offer not even a scintilla of proof of facts that actually relate to their tax situation and the impact of the tax laws in question upon them, i.e., actual New York income tax liability based upon unconstitutionally calculated New York income comparing that with other taxpayers who are not burdened with this law, etc. Plaintiffs have exclusive knowledge of specific facts as they apply to their tax situation but have failed to reveal same - relying instead on hypothetical situations and speculatory comments. Notwithstanding the admonishment contained in the Court's August 17, 1989 Memorandum Decision, relative to the lack of specific, real facts, plaintiffs once again fail to reveal the same - even in the face of a Summary Judgment Motion.

The Court concludes that defendants have established their entitlement to Summary Judgment by making a prima facie case as to the statutes presumed constitutionality and the absence of a negative impact upon non-resident taxpayers and their spouses. Plaintiffs, on the other hand, have failed to lay bare their proof in evidentiary form that issues of fact actually exist sufficient to defeat defendants Motion.

The New York Court of Appeals has repeatedly held that in order to obtain Summary Judgment, a movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose. [Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966, 967, citing Zuckerman v. City of New York, 49 NY2d 557].

What the Court is left with, in essence, is a Declaratory Judgment action that seeks little more than an advisory opinion as no case or controversy exists. In an action for declaratory relief there must be a genuine legal dispute, a "justiciable controversy," between the parties, and declaratory relief will not be granted where it will result only in an advisory opinion. [Harrington v. State of New York, 114 Misc2d 351, 353; aff'd 94 AD2d 863; aff'd 62 NY2d 626; citing New York Public Interest Research Group v. Carey, 42 NY2d 527].

The "justiciable controversy" upon which a declaratory judgment may be rendered requires not only that the plaintiffs in such an action have an interest sufficient to constitute standing to maintain the action, but also that the controversy involve present rather than hypothetical, contingent or remote prejudice to plaintiffs. [American Ins. Assn. v. Chu, 64 NY2d 379, 383]. Thus, no

"justiciable controversy" exists as plaintiffs have failed to satisfy the "present prejudice" requirement.

Defendants Motion for Summary Judgment is granted.

Plaintiffs Cross-Motion for Partial Summary Judgment is therefore denied, as moot.

Papers to the Attorney General to submit Order on formal notice of Settlement. A copy of this Decision is to be attached thereto.

Dated: July 9, 1990 at
Albany, New York

/s/
Daniel H. Prior, Jr.
Justice of the Supreme Court

APPENDIX E

At a Term of the Supreme Court of the State of New York, held in and for the County of Albany, New York.
[September 12, 1990]

PRESENT: HON. DANIEL H. PRIOR, JR.,
Justice Presiding

SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

LAWRENCE J. BRADY, BARBARA A. BRADY, DEBORAH R. LABOVITZ AND JUDAH I. LABOVITZ, Individually and on behalf of all Others Similarly Situated,

Plaintiffs,

ORDER

-against-

Index No. 1721-89

THE STATE OF NEW YORK, MARIO CUOMO, Governor of the State of New York, and JAMES WETZLER, Commissioner of Taxation and Finance of the State of New York,

RJI No. 0189 018168

Defendants

(Judge Prior)

The defendants having made a motion for summary judgment as to all of the issues raised in the plaintiffs' amended complaint, which motion was originally returnable February 27, 1990, but was adjourned to April 3, 1990, and the plaintiffs having

made a cross-motion for partial summary judgment, which cross-motion was returnable April 3, 1990,

AND, the Court having read the defendants' Notice of Motion dated January 3, 1990, the affidavit of John Hudder, sworn to December 18, 1989, the affirmation of David Fruchter, Esq., dated January 3, 1990, the defendants' Memorandum of Law dated January 3, 1990 and the defendants' Reply Memorandum of Law dated April 2, 1990, all submitted in support of the defendants' motion and in opposition to the plaintiffs' cross-motion,

AND, the Court having also read the plaintiffs' Notice of Cross-Motion for Partial Summary Judgment dated March 26, 1990, the affidavit of Barbara A. Brady, sworn to on April 6, 1989, the affidavit of Stuart Hefter, sworn to on May 2, 1989, the affidavit of Judah I. Labovitz, sworn to on July 19, 1989, the affidavit of Scott H. Mustin, Esq., sworn to on May 9, 1989, two affidavits of David H. Weinstein, Esq., sworn to on April 10, 1989 and May 9, 1989 respectively, and the plaintiffs' Memorandum of Law dated March 26, 1990, all submitted by the plaintiffs in opposition to the defendants' motion and in support of the plaintiffs' cross-motion,

AND, the aforesaid motions having been considered upon submission of papers without oral argument, and due deliberation having been had, and the Court having determined that the defendants are entitled to summary judgment as to all of the issues raised in the plaintiffs' amended complaint, and the Court having issued a written decision dated July 9, 1990, which written decision is annexed hereto and made a part hereof, it is hereby

ORDERED, ADJUDGED AND DECREED, that the defendants' motion for summary judgment is granted in all respects, and the plaintiffs' cross-motion for partial summary judgment is denied in all respects; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendants are hereby awarded Three Hundred Dollars ($300.00) in costs against the plaintiffs, consisting of Two Hundred Dollars ($200.00) in action costs pursuant to Section 8201 of the Civil Practice Law and Rules and One Hundred Dollars ($100.00) in motion costs pursuant to Section 8202 of the Civil Practice Law and Rules; and it is further

ORDERED, ADJUDGED AND DECREED, that the Albany County Clerk is hereby directed to enter a Judgment in the amount of Three Hundred Dollars ($300.00) in favor of the defendants against the plaintiffs for the aforesaid costs.

DATED: Albany, New York,
September 12, 1990

ENTER:

/S/
HONORABLE DANIEL H. PRIOR, JR.
Justice of the Supreme Court

CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Petition for Writ of Certiorari and accompanying Appendices to be served upon the following attorneys for respondents by United States first class mail, postage prepaid:

Hon. Robert Abrams,
Attorney General of the
State of New York
Daniel Smirlock,
Assistant Attorney General
The Capitol
Albany, New York 12224

Dated: April 21, 1993

/s/ David H. Weinstein
DAVID H. WEINSTEIN

Supreme Court, U.S.
FILED
MAY 20 1993
OFFICE OF THE CLERK

No. 92-1720

IN THE

Supreme Court of the United States

October Term, 1992

LAWRENCE J. BRADY, BARBARA A. BRADY, DEBORAH R. LABOVITZ and JUDAH I. LABOVITZ,

Petitioners,

against

THE STATE OF NEW YORK, MARIO CUOMO, and JAMES WETZLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 473-0903

JERRY BOONE
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

Of Counsel

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(3080—LC9-789—1993)

Counterstatement of Questions Presented

1. Whether, in view of the long and unbroken line of decisions indicating that a state may rely on property not itself taxable by the state in determining the rate of taxation to be applied to a nonresident's property within its jurisdiction, this Court should grant certiorari in order to review a decision of the New York State Court of Appeals reaffirming that principle.

2. Whether, having concluded in 1981 that permitting nonresidents with income in a given state to claim income tax deductions and exemptions only in the same proportion to the total available deductions and exemptions that their income within the state bears to their total income is not discriminatory and does not violate the Article IV privileges and immunities clause, this Court should grant certiorari in order to reexamine that conclusion.

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No. 92-1720

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

LAWRENCE J. BRADY, BARBARA A. BRADY, DEBORAH R. LABOVITZ and JUDAH I. LABOVITZ,

Petitioners,

against

THE STATE OF NEW YORK, MARIO CUOMO, and JAMES WETZLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondents' Brief in Opposition to Petition for a Writ of Certiorari

Respondents State of New York, Mario Cuomo and James Wetzler respectfully request that the Court deny the petition

for a writ of certiorari seeking review of the decision of the Court of Appeals of the State of New York.

Statement of the Case

Between 1919 and 1987, the New York State income tax of a nonresident was calculated by using a tax rate based only on that part of the nonresident's income derived from New York sources, regardless of the nonresident's total income. Thus, for example, in 1987, a nonresident taxpayer with non-New York income of $270,000 and New York income of $30,000 would have had to pay $1,788 in New York taxes. A nonresident whose total income consisted of $30,000 derived entirely from New York sources would have had to pay the same amount, even though he earned one-tenth as much. And because New York residents are liable for state tax on all their income regardless of its source, a resident with the same $270,000 non-New York and $30,000 New York income would in 1987 have owed tax of $26,054.

Since January 1, 1988, the effective date of the New York Tax Reform and Reduction Act ("TRARA"), the income of nonresidents from all sources has been used in calculating the tax on nonresidents' income derived from sources in New York State. Both before and after the passage of TRARA, nonresidents were liable for New York tax only on their income "derived from or connected with New York sources." N.Y. Tax L. § 631(a). Under TRARA, however, non-New York income is taken into account in determining the tax rate for a nonresident. A non-resident taxpayer now calculates his New York tax by initially computing it as if he "were a resident," and then multiplying the tax a resident would owe on the nonresident's total income "by a fraction,

the numerator of which is [his] New York source income . . . and the denominator of which is [his] federal adjusted gross income." N.Y. Tax L. § 601(e). This process of reducing the nonresident's tax by using the ratio of New York income to total income is called "apportionment."

Thus, to compute his New York tax under TRARA, a nonresident starts with his Federal Adjusted Gross Income—essentially, that is, his total income from all sources. From this figure he subtracts the applicable deductions and exemptions to determine what his taxable income would be if he were a resident. The tax on this amount is called the "tax base," and is what a New York resident with the same total income as the nonresident would pay in New York tax. The nonresident, however, reduces this figure by multiplying it by the proportion of his New York income to his total income. Thus, for example, a nonresident with $75,000 of New York income and $25,000 of non-New York income would pay as New York tax 75% of his tax base.

TRARA, in other words, does not provide for taxation of the non-New York income of nonresidents. Rather, this income, both earned and unearned, is added to nonresidents' New York income to calculate their tax base *as if* they were New York residents. The fact that New York cannot and does not tax the non-New York income of nonresidents is then reintroduced to the calculation by applying the apportionment figure to produce a final tax. The overall effect, in a progressive tax system such as New York's, is to increase the marginal tax rate on the New York income of nonresidents. Their non-New York income is *considered* in the course of this calculation, but it is not taxed.

TRARA also addressed itself to joint tax filings by married couples. "If the federal income tax liabilities of husband and wife . . . are determined on a joint federal return, they shall file a joint New York income tax return, and their tax liabilities shall be joint and several . . . ." N.Y. Tax L. § 651(b)(2). This provision applies equally to nonresident and resident married coupies.

On March 23, 1989, plaintiffs Lawrence J. Brady and Barbara A. Brady commenced this action in the New York State Supreme Court. They alleged that they were married residents of New Jersey, with Mr. Brady employed in New York and Mrs. Brady in New Jersey. The complaint named as defendants the State of New York, its Governor, and its Commissioner of Taxation and Finance. The Bradys alleged that Tax Law § 601(e) violates the due process and Article IV privileges and immunities clauses of the United State Constitution "by, in effect, imposing a rate of tax which is derived in substantial part from income from non-New York sources." They further claimed that the joint filing requirement imposed by § 651(b)(2) violated their constitutional rights by, *inter alia*, attempting "to exercise extraterritorial authority" over nonresident spouses. Their amended complaint, which added as plaintiffs Deborah R. Labovitz and Judah I. Labovitz, identified as a married couple residing in Pennsylvania, reiterated these claims.

Both sides moved for summary judgment. By decision dated July 9, 1990, the State Supreme Court granted defendants' motion in its entirety. Plaintiffs then appealed to the Appellate Division, Third Department. In a decision issued November 27, 1991, that court declared the joint filing requirement unconstitutional "as applied to require the filing of a joint income tax return by a nonresident solely

because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return," but otherwise affirmed the judgment of the lower court. The Appellate Division found the apportionment methodology set forth in § 601(e) "a valid means, under due process, of using income not itself taxable as part of the measurement of the tax imposed on the nonresident's New York income." (21a)[1] Similarly, the court held that the apportionment methodology did not discriminate against nonresident taxpayers and thus entailed no violation of the privileges and immunities clause, for "[r]esident and nonresident taxpayers similarly situated in terms of ability to pay taxes out of all sources of income are treated the same within the parameters of New York's progressive income taxation system."[2] (22a)

The Appellate Division subsequently granted plaintiffs' motion for leave to appeal to the New York Court of Appeals, which on December 22, 1992 issued a decision wholly rejecting plaintiffs' constitutional challenges to New York's method of calculating nonresidents' income tax. It held that New York's method of taxation does not violate the Constitution "so long as the rates are applied, as here, in a nondiscriminatory manner and only to taxable New York income." (10a)

The court first considered what it characterized as plaintiffs "claim that by setting tax rates with reference to [federal] adjusted gross income, New York taxes non-New York income, thus taking property in violation of due process."

[1]Parenthetical citations followed by "a" are to the Appendix to the Petition herein.

[2]The joint filing requirement was not at issue in the Court of Appeals.

(6a) Relying on an unbroken line of cases in this Court and the high courts of other states, the Court of Appeals noted that "[i]t has long been the rule that states may refer to non-taxable out-of-state assets in setting their rates for taxable assets." (7a) As in these prior cases, the court distinguished between a permissible "tax on in-state income, which is within the jurisdiction of the state," even when the rate of taxation of that income is determined in part by out-of-state income, and an unconstitutional tax on nonresidents' out-of-state income. Because, as this Court has held, "[w]hen the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed," the Court of Appeals upheld the apportionment methodology. (7a-9a, *quoting Maxwell v. Bugbee*, 250 U.S. 525, 539 [1919]) Nor, said the court, does the fact that New York considers, in setting the tax rate for married nonresidents, the joint income of nonresidents who have filed joint federal returns, call for a different result. (7a-9a)

The Court of Appeals also rejected plaintiffs' privileges and immunities argument, noting that, to prevail, "plaintiffs must demonstrate disadvantage as against others in a similar position." (10a) This, said the court, plaintiffs could not do, for they are "similarly situated" to New York taxpayers "with the same total income" as plaintiffs. (10a) Because identical rates of taxation are applied to residents and nonresidents with the same total income, there is no discrimination against nonresidents and thus no constitutional violation. (10a)

REASONS FOR DENYING THE WRIT

I.

It is clear from a long, unbroken, and still-vital line of cases that New York's taxation of a nonresident's income at a rate determined by his total income comports with the due process clause.

Far from being, as petitioners (Petition, p. 8) style them, "unresolved," the issues raised by this litigation have been fully and consistently settled by a series of decisions in this and other courts. This Court first established more than seventy years ago that a state tax on a nonresident's property undisputedly subject to the state's taxing power and calculated at a rate determined in part by out-of-state property did not offend the due process clause. Regular judicial reexaminations of this principle have, without exception, affirmed it. There is no reason to grant the petition in this case merely to state the same principle yet again.

Quite apart from their misreading of the applicable case law, a false premise underlies petitioners' entire argument. They contend (Petition, p. 10) that "the challenged statute in effect taxes income earned outside the State." It is true that, with a progressive system of taxation like New York's, a state's reliance on property not itself taxable to determine the rate to be applied to taxable property will result in payment of more tax. But this is not the same as imposing a tax on the non-taxable property itself. Nor is this an abstruse or attenuated distinction. This Court long ago had no difficulty in detecting and explaining the difference between a permissible state tax in which "the property without the

State" bears on "the tax imposed in respect of the property within" only insofar as it "affect[s] the rate of tax" and an impermissible attempt "to compute the tax in respect of the part within the State on the value of the whole." *Frick v. Pennsylvania*, 268 U.S. 473, 496 (1924).

This distinction is reflected in the mathematics of the tax at issue in this case. A New Jersey resident with $40,000 of taxable New York income and $40,000 of non-New York income will pay $3,132 in New York tax: that is the tax on $40,000 calculated *at the rate payable* by a taxpayer with $80,000 of New York income.[3] This is more, to be sure, than the tax paid by a New Jersey resident whose $40,000 New York income is also his entire income. But the same taxpayer, if his entire $80,000 income is in fact earned in New York, will owe $6,264 in New York tax. This demonstrates that the difference between New York's methodology and actually taxing non-New York income is not, as petitioners call it, "a myth" (Petition, p. 8), but rather a real-world, economic distinction that corresponds to the conceptual distinction long acknowledged by this Court. The reality of this distinction is what guarantees that New York's approach, like that of many states before it, survives constitutional scrutiny.

Similarly erroneous is the other basis on which petitioners ground their contention that New York's taxing methodology violates due process. According to petitioners, the approach taken by TRARA is unconstitutional because it "bears no relation to any added services or protection provided by the State." (Petition, p. 10). It is difficult to believe that petitioners truly subscribe to this argument,

[3]This illustration employs 1988 tax tables, which appeared in the Record in the court below. Illustrations taken from subsequent tax years would be similar.

which would, among other things, permit residents and nonresidents alike to prevail in constitutional litigation whenever a state raises taxes but does not increase "services or protection," or else whenever it reduces such services and protection without reducing taxes. Even on its own terms, however, the argument fails. There is simply no requirement that taxes be proportionate to the services offered by a state to its taxpayers. As this Court has noted, "[n]ot only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 n. 15 (1989); *see also*, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-23 (1937). The fact that New York provides an environment in which nonresidents can acquire income is more than enough to justify imposition of a tax on that income.

The constitutionality of a state tax imposed on nonresidents at a rate determined by out-of-state income or property is further demonstrated by the fact that every one of the many courts, including this Court, to have considered the practice has found it perfectly compatible with the guarantee of due process. The question has been settled since at least 1919, when this Court decided *Maxwell v. Bugbee*, 250 U.S. 525 (1919). *Maxwell* involved a due process attack on a New Jersey inheritance tax statute that taxed the New Jersey property of a nonresident decedent in the same ratio to the tax to which the decedent's estate would be subject if the decedent were a resident as the taxable New Jersey property of the estate bore to the entire estate. In other words, as with the New York methodology now at issue, the tax in question was initially calculated "as if" the taxpayer were a resident

and then reduced to reflect the proportion of taxable (i.e., in-state) value to total value. To this Court, the validity of the tax was virtually self-evident:

> When the State levies taxes within its authority, property not itself taxable by the State may be used as a measure of the tax imposed. . . . In the present case, the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it. 250 U.S. at 539-40.

The distinction in *Maxwell* is straightforward and obvious: State taxes on nonresidents may be measured by assets outside the State as long as they are not imposed on such assets. This Court relied on the same distinction in *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), which involved a Louisiana "license tax" on in-state chain stores that was based on the number of stores owned by the taxpayer both in Louisiana and elsewhere.

Plaintiffs had argued that "the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana." 301 U.S. at 424. As in *Maxwell*, however, there was a crucial distinction between the subject of the tax and its measurement. Although the tax was calculated on the basis of a taxpayer's nationwide operation, nonetheless "[i]n legal contemplation the State does not lay a tax upon property lying beyond her borders." 301 U.S. 425.

Recognizing that *Maxwell* and *Grosjean* decades ago set forth the now-settled principles that led the courts below to the correct result in the present case, petitioners attempt to question the meaning and authority of these decisions (Petition, pp. 15-17). These efforts are unsuccessful. Petitioners first argue, on the basis of a single sentence in *Maxwell*, that the case does not mean what it appears to but rather relies on a discredited "formalistic" analysis of the tax involved in terms of a "privilege." The sentence in question—the last sentence in the passage from *Maxwell* quoted above—fails to support this reading. Throughout this passage, the contrast is between a tax on "a privilege to succeed to property which is within the jurisdiction of the State" and "a tax upon property beyond the State's jurisdiction." 250 U.S. at 539. The only reason *Maxwell* speaks of property as opposed to privilege is because the taxpayer in that case attempted exactly the same argument petitioners now essay: that the State is reaching beyond the taxable activity occurring within its borders to impose a tax on property outside its jurisdiction. *Maxwell* speaks of "privilege" because the in-state activity that made taxation possible *happens to have been a privilege*, not because of some outmoded concept of territoriality. The nature of the activity makes no difference to this Court's conclusions that there is a difference between a State's taxing property over which it has no jurisdiction

and calculating a tax in terms of the taxpayer's total property, and that only the former offends due process.

The property/privilege distinction, which according to petitioners was central to the holding in *Maxwell*, can be found nowhere in this Court's subsequent decisions. In *Frick*, for example, decided only five years later, the Court described *Maxwell* as turning on the distinction between determining the rate of tax "imposed in respect of the property within" the State partly on the basis of "the property without the State" and "comput[ing] the tax in respect of the part within the State on the value of the whole." 268 U.S. at 496.[4] Likewise, in *Grosjean*, the Court, though recognizing that it was dealing with a tax on the "privilege" of doing business in Louisiana, noted that "[i]n legal contemplation the state does not lay a tax upon property lying beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states," and that the approach to taxation adopted by Louisiana "is not in legal effect the taxation of property or privileges possessed or enjoyed by the taxpayer beyond the borders of the state." 301 U.S. at 425. The critical distinction is not between "property" and "privilege," but between taxation permissibly imposed at a rate determined by out-of-state activity and taxation unconstitutionally exacted on out-of-state property, privilege or anything else.

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[4]The fact that, as petitioners note (Petition, p. 17), *Frick* characterized the five-to-four decision in *Maxwell* as "on the border line," 268 U.S. at 495, is hardly significant after the passage of some seven decades. Like many other principles first enunciated in closely-contested cases of this Court, the principle governing both *Maxwell* and this case has become well-established law.

Any conceivable validity petitioners' discussion of *Maxwell* might once have had is completely vitiated by this Court's action in *Wheeler v. State*, 127 Vt. 361, 249 A.2d 887, *appeal dismissed for want of a substantial federal question*, 396 U.S. 4 (1969). At issue in *Wheeler* was Vermont's taxation of the "Vermont derived income" of a New Hampshire resident exactly as New York taxes plaintiffs: by calculating tax on total income and then apportioning the tax according to the ratio of in-state to total income. The Vermont Supreme Court rejected the plaintiff's due process argument, substantially identical to that of the present plaintiffs, that "since the addition of New Hampshire income increases the tax, it must be New Hampshire income that is being taxed." 249 A.2d at 890. The court disagreed: "What is happening is that Vermont income is being taxed at an increased rate, and nothing more." *Id.* This Court's dismissal of the appeal in *Wheeler* for want of a substantial federal question was, in effect, a decision on the merits, indicating its view that the judgment appealed from was correct as to the federal questions raised in and necessary to the decision. *See, e.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979). In other words, the principle of *Maxwell* is not confined to taxes formalistically defined as being on state "privileges," but rather extends to validate income taxes imposed on nonresidents' in-state earnings at a rate determined by their total income.

Embarrassed by *Wheeler*'s ready application to their case, petitioners mention it only in a footnote (Petition, p. 19 n. 13) and deal with it only obliquely, by noting that it was decided before certain decisions of this Court that, according to petitioners (Petition, pp. 16-17), repudiate *Maxwell* (*Wheeler* is never mentioned in this context) by rejecting "formalistic analysis of the state tax" in question in favor of

examining the "economic realities and the practical effects of the tax." Though it is true that this Court's recent decisions pay heed to the "economic realities" of modern commerce, *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 295-96 (1987), this fact offers no comfort to petitioners. Doing as plaintiffs urge and ignoring a taxpayer's extensive income beyond what is taxable in a given state hardly strikes a blow for economic realism. Indeed, as noted in an article repeatedly cited with approval by petitioners, the chief justification for the approach to taxation upheld in *Wheeler* and now at issue once again lies not in the empty formalism of territoriality but rather in the real-world determination, bearing "no necessary relationship to political boundaries," that "a taxpayer shall shoulder a proportionately greater tax burden as his income rises." W. Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Michigan L. Rev. 1309, 1323 (1974).

Even on its own terms, moreover, plaintiffs' argument that this Court's recent due process and commerce clause jurisprudence somehow embodies a repudiation of the principles that controlled *Maxwell* and *Wheeler* is demonstrably erroneous. Prior to the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), on which plaintiffs rely, it was the law that a tax on a local privilege could not be applied to an activity that is part of interstate commerce. *Complete Auto Transit*, concluding that this approach ignored economic realities, overturned this *per se* rule, while finding nothing wrong with characterization of doing business either in a state or interstate commerce as a "privilege," 430 U.S. at 287. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), is to the same effect, scrutinizing a state tax on interstate commerce for its discriminatory

effect in lieu of a blanket holding that states may tax only local, intrastate privilege without violating the Commerce Clause. And in *American Trucking Associations*, the Court took pains to note that, in view of the "economic realities" of modern commerce, "interstate commerce as such has no immunity from State taxation." 483 U.S. at 295-6.[5] The common thread of these cases is this Court's willingness to find a tax on the privilege of doing business in a state compatible with the Commerce Clause even when the business being done is actually interstate commerce. Nothing in these cases indicates that, as petitioners suggest (Petition, p. 16), *Maxwell* and *Wheeler* are "no longer good law."

Thus, the line of precedent stretching from *Maxwell* through *Wheeler* and beyond to the present case is uninterrupted by any shift in this Court's perspective.[6] Petitioners finally attempt (Petition, pp. 13-14) to persuade this Court to review the decision below by suggesting that New York's calculation of its tax rate on the basis of the joint income of nonresident spouses who file joint federal returns, even when one spouse has no New York income, is a practice

[5]Petitioners also cite *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981), which dealt with the extent to which a state may impose conditions upon a privilege without offending the equal protection clause and did not address due process concerns at all.

[6]Two recent additional cases address the same issues resolved in *Wheeler* with the same result. *See*, *United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987) (no due process violation in calculating state tax on basis of nonresident military income, for "[t]he income in the taxing state is merely being taxed at an increased rate pursuant to a progressive system of taxation premised on the individual's ability to pay"); *Aronov v. Secretary of Revenue*, 323 N.C. 132, 371 S.E.2d 468 (1988) (rejecting due process challenge to state statute requiring nonresident taxpayer to reduce his distributive share of a North Carolina partnership's net operating loss by his out-of-state income).

deserving special constitutional scrutiny. In *Stevens v. Tax Assessor*, 571 A.2d 1195 (Me.), *cert. denied*, 498 U.S. 819 (1990), the Supreme Court of Maine upheld that State's policy of determining its state income tax rate for nonresident married couples on the basis of their total income and calcualting the actual tax paid by apportionment. The Court relied on *Maxwell* and *Wheeler* to conclude that Maine's taxation of married nonresidents "does not deprive them of their property without due process." 571 A.2d at 1196. Although this case was the first to deal with nonresident income tax calculated on the basis of joint marital income, this Court saw no reason to grant certiorari. There is likewise no reason for it to do so now, only three years later.

Nor is there anything constitutionally suspect, beyond what is plainly resolved by *Maxwell* and *Wheeler*, about New York's approach to the New York income of a spouse who has filed a joint federal tax return. It is true, as petitioners note (Petition, p. 13), that "[t]he filing of a joint federal tax return does not convert the separate incomes of each spouse into joint property of both." But this is irrelevant, for New York is not asserting any sort of power over the property, joint, separate or otherwise, of a nonresident spouse with no New York income. Rather, it is asserting only its power to consider total marital income in calculating the tax rate for individuals whose filing of a joint federal return indicates their willingness to be considered with their spouses as a single unit for tax purposes. As this Court's refusal to review the decision in *Stevens* suggests, the income of a nonresident spouse without New York income is, for purposes of calculating and apportioning New York income, constitutionally indistinguishable from the non-New York income of the nonresident spouse with New York earnings. When a married couple files a joint federal return,

their joint income is a valid index of the rate of tax to be imposed on the New York earnings of the one member of the couple with New York income. If, as *Maxwell* and *Wheeler* indicate, taxation of a nonresident's New York income at a rate determined in part by out-of-state income is not in effect a tax imposed extraterritorially and in violation of due process, then this principle applies with equal force, and without necessity of further scrutiny by this Court, to married nonresidents filing a joint federal return when only one member of the couple has New York income.[7]

The central constitutional question posed by petitioners is thus far from "unresolved." Rather, it is and for decades has been well settled that, as this Court said in 1919, "[w]hen the State levies taxes within its authority, property to itself taxable by the State may be used as a measure of the tax imposed" without violating the due process clause. *Maxwell*, 250 U.S. at 539. There is no reason for this Court to grant the petition merely to reconsider this principle.

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[7]Contrary to petitioners' suggestion (Petition, p. 13), this conclusion is unaffected by the state court's invalidation on due process grounds of the joint filing requirement. Even without this requirement, the State can obtain the necessary information regarding a couple's joint income simply by compelling the nonresident spouse with New York income to disclose the information from his and his spouse's federal joint return on his separate New York tax return. Federal law itself, which permits inspection of federal returns by any state agency "which is charged under the laws of such State with responsibility for the administration of State tax laws," Internal Revenue Code § 6103(d)(1), contemplates this possibility. Obtaining information contained in their joint federal return from the spouse with New York income about the other spouse's income is not an assertion of "jurisdiction" over the latter and does not implicate due process.

II.

There is no conflict between the decision below and prior decisions of this Court involving the Article IV privileges and immunities clause.

Far from conflicting with the constitutional guarantee that the "citizens of each state shall be entitled to all the Privileges and Immunities of Citizens of the several states," U.S. Const. Art. IV, § 2, New York's approach to taxing nonresidents comports with established law in this area. The privileges and immunities clause bars "disparity of treatment" between residents and nonresidents. *Toomer v. Witsell*, 334 U.S. 385, 396 (1947). If, as in the present case, there is no such disparity, then the constitutional guarantee is not implicated.

Petitioners contend (Petition, pp. 20-21) that unconstitutional discrimination can be found in the fact that New York's taxing methodology "has the net effect of reducing the value to nonresidents of exemptions and deductions, the full value of which is available to residents." At the most obvious level, this is false: on their New York tax returns, plaintiffs are credited with exactly the same deductions and exemptions as nonresidents. What evidently troubles petitioners is that, because they are taxed by first calculating their tax "as if" they were residents and then reducing it by apportionment, the deductions and exemptions lose the dollar-for-dollar status they have for residents, for whom there is no apportionment. But apportionment also works to reduce the income on the basis of which a nonresident's tax is calculated. The end result is the same: residents and nonresidents alike are taxed at a rate that reflects their total income from all sources, reduced by the full amount of the

applicable exemptions and deductions. The amount of tax on nonresidents only will be further reduced to the extent they have out-of-state income. There is no discrimination or disparity of treatment here and thus no violation of the privileges and immunities clause.

That this Court subscribes to this unexceptionable conclusion is demonstrated by *Lung v. O'Chesky*, 94 N.M. 802, 617 P.2d 1317 (1980), *appeal dismissed for want of a substantial federal question*, 405 U.S. 961 (1981). The issue in *Lung* was the same as in the present case: Whether a state's apportionment procedure for nonresident income tax, whereby deductions and exemptions are allowed only in the same proportion that a nonresident's in-state income bears to his total income, discriminates against nonresidents under the privileges and immunities clause. The state court found that it did not, and this Court's dismissal of the appeal for want of a substantial federal question was tantamount to an affirmance on the merits. *See also*, *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *affirmed by an equally divided Court*, 471 U.S. 82 (1985) (upholding state-court decision that invalidated State's complete disallowance to nonresidents of certain deductions available to residents, but made clear that apportionment of deductions is constitutionally permissible). Nothing has occurred since 1981 to warrant reexamination of this conclusion.[8]

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[8]Petitioners also assert (Petition, p. 21) that the New York taxing scheme discriminates against nonresidents "in that it permits a resident who is married to a nonresident the option of filing a separate return—based solely upon the resident's income—while denying that option to a resident who is married to a nonresident." While that statement is untrue, this issue is in any case irrelevant, for it was not raised by petitioners in the Court of Appeals or addressed by that court, and thus will not be reviewed by this Court on certiorari. *See*, *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
May 18, 1993

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondents

JERRY BOONE
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

Of Counsel

NO. 92-1720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE J. BRADY, BARBARA A. BRADY,
DEBORAH R. LABOVITZ, AND JUDAH I. LABOVITZ,

PETITIONERS,

V.

THE STATE OF NEW YORK, MARIO CUOMO,
AND JAMES WETZLER,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

ALBERT G. LAUBER, JR.
CAPLIN & DRYSDALE,
CHARTERED
ONE THOMAS CIRCLE, N.W.
WASHINGTON, D.C. 20005

SCOTT H. MUSTIN
LABRUM & DOAK
1818 MARKET STREET
SUITE 2900
PHILADELPHIA, PA 19103

JOSEPH H. EINSTEIN
GOODKIND, LABATON, RUDOFF &
SUCHAROW
122 EAST 42ND STREET
NEW YORK, NY 10168

DAVID H. WEINSTEIN*
ROBERT S. KITCHENOFF
LINDSEY B. SLAUGHTER
KOHN, NAST & GRAF, P.C.
1101 MARKET STREET
SUITE 2400
PHILADELPHIA, PA 19107
(215) 238-1700

ATTORNEYS FOR PETITIONERS

*COUNSEL OF RECORD

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REPLY BRIEF FOR PETITIONERS

1. In its brief, New York has offered no substantive or precedential justification for the compelled inclusion of a nonresident spouse's income on a nonresident's tax return. The requirement violates due process.

Petitioners have stated (Pet. at 13) that there is no known prior court decision supporting the constitutionality of including a spouse's income in the formula for taxing a nonresident's income. The State disputes this assertion, pointing (Br. at 15-16) to *Stevens v. State Tax Assessor*, 571 A.2d 1195 (Me.), *cert. denied*, 111 S.Ct. 65 (1990). *Stevens*, however, lends no support to the State.

Although the nonresident taxpayers in *Stevens* were married, their case did not concern a due process challenge to the involuntary inclusion of the spouse's income in the calculation of the taxpayer's income tax. *See* Pet. at 19 n.13. The decision is thus silent about it. The Maine statute at issue there, unlike New York's here, offered the nonresident taxpayer the choice of filing either separately or jointly. ME. REV. STAT. ANN. tit. 36 § 5221(2). Having voluntarily opted to file jointly, the taxpayer couple in *Stevens* could hardly claim a due process violation on the theory that joint income was *involuntarily* used as the basis of taxation. That decision, then, offers no support for the New York tax scheme at issue here. And New York points to no other precedent to authorize what the State has done.

The State's brief—like the opinion below—fails to offer any principled basis upon which the nonresident's tax may be determined with reference to income derived by the taxpayer's nonresident spouse, not the taxpayer.[1] The amici curiae, Pennsylvania

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1 The State's citation (Br. at 17 n.7) to the Internal Revenue Code, 26 U.S.C. § 6103(d)(1) is a "red herring." The statute is irrelevant, because although it may allow New York access to federal income tax return information under certain circumstances, the statute does not authorize the State to use that information in any

(continued...)

and New Hampshire, have discussed the manifold defects of New York's law in this respect, and petitioners specifically adopt that discussion.

In another context, this Court recently explained the distinctiveness and separateness, under our Constitution, of each spouse in a marriage:

> "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. . . ."

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2830 (1992), quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). "The Constitution," the Court continued in *Planned Parenthood*,

> protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

112 S.Ct. at 2830. Of course, here the State's enactment is not even intended to benefit the spouse; rather, New York seeks to extract unwarranted additional tax because of the spouse's activities elsewhere.

New York argues that it may presume that a married couple, by exercising their federal law option to file jointly, thereby intend an election to be treated jointly by any state from which either spouse derives income. New York's argument is logically

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1(...continued)
particular fashion. At issue here is the constitutionality of New York's *use* of joint income data.

incorrect. The filing of a joint federal return raises no inferences, much less a presumption, about how the nonresidents want to be treated for the very different state tax purposes, which may involve different monetary considerations. Indeed, as petitioners have explained (Pet. at 22), several states, including Maine, afford married couples the right to file separate state returns even if they file a joint federal return. Moreover, New York law does *not* embody such a presumption, since the State offers this "separate return" option to any resident who is married to a nonresident. Tax Law § 651(b)(4). This clearly shows that the filing of a joint federal return does not constitute an election to be considered with one's spouse as a single unit for *all* tax purposes.[2]

The State argues (Br. at 17 n.7) that compulsory inclusion on the taxpayer's return of the nonresident spouse's income "is not an assertion of 'jurisdiction' over the latter." That is simply wrong. By including spousal income in the return, New York increases the tax solely because of the spouse's ability to pay. The State is thus saying one of two things: (1) the spouse's income belongs to and is at the disposal of the taxpayer, or (2) the spouse's ability to pay, considered in isolation, justifies a higher tax. As the amici have explained, the former argument is foreclosed by the law of Pennsylvania and other states. The latter argument is a naked assertion of jurisdiction over the nonresident spouse which, in accordance with the Appellate Division's holding, New York may not exercise.

2. The State questions whether petitioners have properly characterized one of their privileges and immunities challenges and

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2 New York's unstated but implied presumption also runs counter to the purpose of the joint filing privilege under federal law, to equalize the tax burdens of citizens of common law states and community property states. *See In re Wetteroff*, 453 F.2d 544, 547 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972); *McClure v. United States*, 228 F.2d 322, 325 (4th Cir. 1955). No such rationale could apply intrastate to support New York's argument here.

whether they have preserved the issue. Petitioners described the specific privileges and immunities violation (Pet. at 21) as "permit-[ting] a resident who is married to a nonresident the option of filing a separate return—based solely upon the resident's income—while denying that option to a nonresident who is married to a nonresident." New York does not deny that such discrimination between its residents and nonresidents would violate the privileges and immunities clause. Instead, the State asserts that the petitioners' description of the Tax Law "is untrue" and that the point "was not raised by petitioners in the Court of Appeals." Br. at 19 n.8.

Petitioners' statement *is* true. The Appellate Division in this case cited Tax Law § 651(b)(4) as providing that, "if one of the spouses is a resident and the other is a nonresident, they may elect to file either separate or joint State income tax returns, irrespective of whether they filed a joint Federal return." App. 18a. Clearly, then, the State errs in labelling petitioners' statement "untrue."[3]

Similarly, petitioners have properly preserved this aspect of their privileges and immunities challenge. As they had in their trial court pleadings and motion for summary judgment, petitioners explicitly raised this issue in their brief to the Appellate Division.[4] Following that court's invalidation of Tax Law § 651(b)(2) as

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3 Surely, the State is not quibbling with the assertion that a separate return in the circumstances would be "based solely upon the resident's income." Tax Law § 651(b)(4) expressly directs the husband and wife to use "separate New York income tax returns on separate forms," and in that event, "their tax liabilities shall be separate." Obviously, the husband reports his income separately from the wife's reporting of hers.

4 The brief (at 1) formulated the issue as whether § 651(b)(2) of the Tax Law violates the privileges and immunities clause because it "denies to such nonresident taxpayers an election afforded similarly situated resident taxpayers to file a separate, individual return."

applied to nonresidents like petitioners, the State's Department of Revenue issued a bulletin to all nonresident taxpayers affording them a "separate return" option, both prospectively and retrospectively, for any years in which their spouses were nonresidents with no New York income. *See* Pet. at 21 n.15. Thus, at the time petitioners took their appeal to the Court of Appeals, there no longer was this portion of the discrimination originally challenged in the trial court and the Appellate Division.

That discrimination only re-emerged as an issue after the Court of Appeals held that joint income must be reported even though on a separate return. In effect, this overruled the Appellate Division's holding in all but one narrow respect: who must sign the tax return. This result was totally unexpected, since the State had not cross appealed from the Appellate Division's judgment invalidating § 651(b)(2) and holding §§ 601(d) and (e) otherwise "marriage neutral." App. 21a. Under these circumstances, this important issue is properly before the Court on the present Petition.

3. In the Petition (at 9) petitioners explained the essential difference, for due process purposes, in the obligations and concomitant tax powers of a domiciliary state and those of other states, precluding the latter to look to the entire income of a nonresident in formulating an income tax. New York does not dispute this fundamental principle. Instead of addressing it and proffering a reasoned explanation why the State's tax scheme comports with due process, the State merely seeks refuge in an illusory "long line" of cases that uncritically relied upon the formalistic myth underlying *Maxwell v. Bugbee*, 250 U.S. 525 (1919). As discussed above, however, none of the cases New York cites supports inclusion of spousal income on the nonresident's tax return.

Contrary to New York's Brief, moreover, there is no "long line" of previous decisions applying the rationale of *Maxwell* to state income taxes like those here. What few decisions there are

cannot withstand critical scrutiny. There are, in fact, only two cases that have directly applied *Maxwell* and *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), to uphold, against a due process challenge, state income taxes on nonresidents. *See Wheeler v. State*, 249 A.2d 887 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969),[5] and *Stevens*, *supra*.[6] As explained in the Petition (at 19 n.13), neither of those decisions, both from courts of the states imposing the taxes being challenged, provides an adequate reasoned basis for the decision below.

4. The State (Br. at 14) errs in arguing that economic reality supports its tax scheme. The Court has focused upon

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5 *Wheeler v. State*, 253 A.2d 136 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969), was a companion case involving a different tax year. The dismissal by this Court of the *Wheeler* appeals for want of a substantial federal question adds nothing to the value of *Wheeler* as precedent, despite the State's argument. *See* Br. at 13. This Court's doctrinal developments upon which the Petition is based and upon which the dissent below relied are all subsequent to that dismissal. As demonstrated by *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), on which the State relies (Br. at 13), the Court is not barred from granting review of an issue in a subsequent case, like this one, merely because it may have dismissed the appeal in an earlier case, such as *Wheeler*.

6 The State implicitly acknowledges, by relegating them to a footnote (Br. at 15, n.6), that the only two other decisions in the putative "long line" are not directly on point. *See Aronov v. Secretary of Revenue*, 371 S.E.2d 468 (N.C. 1988) (out-of-state deductions), and *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987) (statutory construction), discussed in the Petition (at 19 n.13). The dissent in *Aronov* explained that the "attempted taxation must fail 'where the State exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction *in such a way as to really amount to taxing that which is beyond its authority.*'" 371 S.E.2d at 475-76, quoting with emphasis added, *Maxwell*, 250 U.S. at 539-540.

economic reality,[7] because labels are an inadequate substitute for understanding the true consequences of a taxing scheme. As the dissent recognized below, the "significance for present purposes" of this Court's prior cases cited in the Petition (at 16-17) "is not their specific holdings but the methodology employed by the Court in analyzing the statutes: *i.e.*, looking to the practical effect and economic realities of the tax in issue." App. 12a n.1.

New York, like the court below, nevertheless takes cover behind labels, saying that, while the State's income tax is *measured by* total income, including out-of-state income, the tax is only *imposed on* the in-state portion of the income. This is a resort to legal fiction, not an analysis of economic reality. As the Court has recently observed, "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." *Trinova Corp. v. Michigan*, 111 S.Ct. 818, 829 (1991). The reality is that New York's tax on nonresidents' income is increased *solely because of* non-New York income. That is tantamount to an impermissible tax on the non-New York income.

In the Petition, petitioners have explained the various reasons why this case, dealing with the tax powers of states over hundreds of thousands, if not millions, of interstate commuters, is an important one for the Court to review. New York has not disputed any of those reasons. As the dissent below correctly observed, "Whether the [Supreme] Court will again resort to the *Maxwell*-type of labelling in order to uphold a taxing scheme—where out-of-

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7 While the State quotes Prof. Hellerstein's general discussion of the rationale for progressive tax structures (Br. at 14), the State carefully avoids his conclusion that the justification for such structures "is rooted in fundamentally jurisdictionless concepts." W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. 1309, 1324 (1974). It is nevertheless clear the author does not support a *Maxwell*-based logic applied to the circumstances here. *See* Pet. at 17, n.11; 21 n.14.

state income of the taxpayer and the taxpayer's spouse is used to increase the tax on the taxpayer's in-state income—only the Supreme Court can tell us." App. 16a. This case is an excellent opportunity for the Court to embrace economic reality in individual income taxation as it has already done in corporate taxation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: May 28, 1993

David H. Weinstein*
Robert S. Kitchenoff
Lindsey B. Slaughter
Kohn, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Albert G. Lauber, Jr.
Caplin & Drysdale
Chartered
One Thomas Circle, N.W.
Washington, D.C.

Joseph H. Einstein
Goodkind, Labaton,
Rudoff & Sucharow
122 East 42nd Street
New York, NY 10168

Scott H. Mustin
LaBrum & Doak
1818 Market Street, Suite 2900
Philadelphia, PA 19103

Attorneys for Petitioners

*Counsel of Record

NO. 92-1720

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Lawrence J. Brady, Barbara A. Brady, Deborah R. Labovitz, and Judah I. Labovitz,

Petitioners,

v.

The State of New York, Mario Cuomo, and James Wetzler,

Respondents.

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA AND NEW HAMPSHIRE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES J. HAGGERTY
General Counsel of Pennsylvania

Gregory E. Dunlap
Deputy General Counsel
Office of General Counsel
333 Market Street
Harrisburg, PA 17120
(717) 783-6563

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania

Michael A. Roman*
Chief Deputy Attorney General
Tax Litigation Section
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(717) 783-1460

ATTORNEYS FOR AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA
*Counsel of Record

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INTEREST OF AMICUS CURIAE

A. PRELIMINARY STATEMENT

The effect of the provisions of the New York Tax Law which the New York Court of Appeals has upheld is to require married Pennsylvania residents who work in New York and file joint federal tax returns to pay New York income tax not only on the income they earned in New York but also on their spouse's income -- even if the spouse resides and works in Pennsylvania and has no New York source income. This law violates the rights of due process and equal protection of Pennsylvania citizens who work in New York and their spouses for the reasons described in the Petition for Writ of Certiorari. New York's constitutional error is founded in great part on its

illegitimate assumption that a married couple residing in another state is willing to be treated as a single taxable unit for all purposes simply because they filed a joint federal return.

The New York law also erodes Pennsylvania's ability as a sovereign state to tax incomes earned by its residents within its borders. This result occurs both because Pennsylvania allows a limited income tax credit for income taxes paid to other states and because New York's cross-border tax diminishes the resources of Pennsylvania residents to support their own state's and local communities' tax efforts necessary to provide services to Pennsylvania

residents.[1]

The New York law is not an isolated example of this brand of extraterritorial tax policy. Ohio already has a tax law which emulates that of New York and, therefore, adversely affects Pennsylvanians who work in Ohio. Moreover, based on the New York precedent, other states bordering Pennsylvania may well be tempted to enact tax laws modeled after the New York law. According to the petitioners, New Jersey is even now

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[1]Approximately 29,000 Pennsylvanians have incomes derived from New York sources and, thus, are liable to pay income tax to New York. When a Pennsylvanian pays income tax to New York, the Commonwealth of Pennsylvania (like most other states), in turn and in fairness to its citizens, allows a credit against the income tax which would otherwise be due to Pennsylvania on that New York income. See Pa. Stat. Ann. tit. 72, §7314 (Purdon 1990); 61 Pa. Code §§111.3 - 111.5.

actively considering retaliation for New York's law. See Pet. for Writ of Cert., at 23-24 (quoting State Tax Notes 708 (Mar. 29, 1993)). Regardless of its motivation, however, such retaliation by New Jersey would skewer both residents of New York and Pennsylvania who work in New Jersey.

B. IMPACT OF NEW YORK TAX LAW ON PENNSYLVANIA

1. Pennsylvania Tax Law

When a resident of one state earns income in another, the state providing the income is entitled, consistent with due process under the United States Constitution, to receive payment for the benefits, protections and opportunities provided to the cross-state commuter.

Thus, when a New York resident earns income in Pennsylvania, Pennsylvania is entitled to receive from the New York commuter a fair share of his income, through taxation, as compensation for the services, opportunities, protections and benefits he receives by virtue of his employment in Pennsylvania. Consistent with the limits of due process, Pennsylvania imposes under its Tax Reform Code of 1971[2] a tax upon a nonresident, at a rate of 2.8 percent, on "that part of his income derived from sources within [Pennsylvania]." Pa. Stat. Ann. tit. 72, §§7302(b)(2), 7308 (Purdon 1990 & Supp. 1992) (emphasis added). However, also consistent with the requirements of due process, any income a resident of New York

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[2] Act of March 4, 1971 (P.L. 6, No. 2), as amended, Pa. Stat. Ann. tit. 72, §§7101-10004 (Purdon 1990 & Supp. 1992).

or any other state might earn outside of Pennsylvania is entirely excluded from taxation by Pennsylvania or from consideration in the computation of Pennsylvania income tax liability.

Some residents of New York and other states who earn income in Pennsylvania are married to a spouse who also earns income in Pennsylvania. For those couples -- both of whom are subject to Pennsylvania's tax of 2.8 percent on their respective incomes derived from sources in Pennsylvania -- Pennsylvania provides an option. The couple may, if they elect to do so, file a single joint return and determine a joint taxable income for which both spouses are jointly and severally liable. Id., §§7309, 7331 (Purdon 1990). However, if a nonresident should choose to file a return only for himself, then his

income from sources within Pennsylvania would be determined separately from the income of his spouse; and the taxpayer's income tax liability would be deemed to be the separate and individual liability of that taxpayer without regard to his spouse's income. Id., §§7309(a), 7331(a); 61 Pa. Code §117.2(a). These options, provided to all nonresident Pennsylvania taxpayers, are the same options Pennsylvania accords to its own citizens. Indeed, Pennsylvania recognizes, as a matter of its constitution, that couples in a marriage are not a single economic entity but individuals with an independent social, economic and legal status. See Denoncourt v. State Ethics Commission, 504 Pa. 191, 420 A.2d 945 (1983); Estate of Grossman, 486 Pa. 460, 406 A.2d 726 (1979).

Consistent with due process under the United States Constitution, no person from New York or any other state who derives income from Pennsylvania is required to report or to pay tax to Pennsylvania based on income that is derived from New York or any other state. Consistent with both due process and fundamental principles of privacy, Pennsylvania also does not require a nonresident taxpayer to report to Pennsylvania his or her spouse's income or to pay income tax based upon his or her spouse's income. Thus, Pennsylvania recognizes that, consistent with due process, New York residents who derive income from Pennsylvania may fairly be taxed based solely upon the income which they individually earn in Pennsylvania or derive from Pennsylvania sources.

These rules under Pennsylvania's Tax

Reform Act and implementing regulations are based upon three important governing principles:

> (1) Respect for the sovereignty of New York and other states and their primary authority to impose income taxes on their own residents without undue overreaching by Pennsylvania.
>
> (2) Respect for the exclusive rights of other states to establish the legal rules governing the economic relationships between married couples domiciled in that state and, to the extent not determined by another state's law, respect for the privacy and independence of the partners to a marriage to choose the rules of their own relationship, including those affecting their financial dealings between each other and with the government;

and

(3) Imposition of taxes on only that portion of income which "bears fiscal relation to the protections, opportunities and benefits given by the state," consistent with due process. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

2. New York Tax Law

Under TRARA, New York has seriously invaded Pennsylvania's and other states' important interests and prerogatives as sister states. First, New York has improperly invaded the taxing prerogatives of Pennsylvania and other states. When New York imposes additional taxes on Pennsylvanians and other nonresidents

beyond those which fairly reflect the services, protections and opportunities provided to nonresidents by New York, New York takes directly from Pennsylvania and other states important revenue upon which those states depend to provide services and protections to their own citizens. New York's tax, therefore, harms Pennsylvania and other states directly when it overreaches the borders by depriving the other state of income tax revenue.

Equally important, the new tax policy imposed by New York under TRARA has the destructive effect of draining the resources of the Commonwealth of Pennsylvania and other states, their local taxing jurisdictions and the people of Pennsylvania and other states surrounding New York. When New York reaches across

state lines -- as it does under TRARA -- to impose taxation based upon income earned by individuals in Pennsylvania and other states who receive no income in New York (i.e., spouses of nonresident New York taxpayers), or to impose taxation based upon income with no connection to New York (i.e., non-New York source income of nonresident taxpayers and their spouses), New York invades the very core of Pennsylvania's and other states' abilities as sovereign states to sustain themselves and the abilities of their local school districts and municipalities to maintain essential human services. Thus, when New York commands a Pennsylvania couple to pay a tax to New York based upon income earned in Pennsylvania or from other non-New York sources, New York not only violates the personal civil rights of the citizens of

Pennsylvania, it erodes the very sovereignty of the Commonwealth.

Third, the New York Tax Law, as amended by TRARA, substantially intrudes into the individual privacy interests of Pennsylvania citizens and their families in a manner deeply offensive to Pennsylvania constitutional law. Through its income reporting requirements, New York trammels upon the basic foundations of the marital relationship of Pennsylvania citizens in which Pennsylvania has the most compelling of interests. The New York Tax Law strikes at the heart of Pennsylvania's constitutionally protected rights of privacy and individuality between married couples who live in Pennsylvania by requiring a New York taxpayer who resides in Pennsylvania to disclose to New York not only his own income but the income of

his Pennsylvania resident spouse. In this way, New York requires Pennsylvanians to disclose information to New York which Pennsylvania itself would not be able constitutionally to require of its own citizens. See Denoncourt v. State Ethics Commission, 504 Pa. 191, 470 A.2d 945 (1983).

C. INTERESTS OF COMITY

By reaching across state lines to include, for tax calculation purposes, Pennsylvania source income -- including the income of Pennsylvanians who have no connection with New York -- New York invites other states to retaliate in a way which substantially undermines the delicate comity among the states. Indeed, retaliation by New Jersey or other states for New York's interstate taxation would

also negatively impact Pennsylvania since such retaliatory legislation would skewer Pennsylvanians as well as New Yorkers who work in New Jersey or in other states which impose retaliatory taxation.

Governor Robert P. Casey of Pennsylvania expressed that very concern when he presented testimony to the United States Congress four years ago. In a statement submitted to the Committee on Finance of the United States Senate on June 13, 1989, Governor Casey said:

> New York's cross-border tax policy has created hostility between the states and raised the specter of retaliatory legislation. If all of the states bordering New York are to provide a full range of services to residents and nonresident-commuters

> alike, unilateral aggrandizement like the New York system must be avoided. In the final analysis, unneighborly attempts to shift the tax burden onto nonresidents can only lead to interstate conflict.

Commuter Tax Moratorium Bill: Hearing on S. 800 Before the Senate Committee on Finance, 101st Cong., 1st Sess. 101 (1990) (statement of Robert P. Casey, Governor of Pennsylvania).

Governor Casey's words are no less true today than they were in 1989. Indeed, under the pressures increasingly placed upon states to raise additional revenues, it would be surprising if retaliatory taxation were not launched in other jurisdictions, such as New Jersey, which have a progressive form of income

taxation.

ARGUMENT

A. STATE COURT PROCEEDINGS

1. Appellate Division

Under section 651(b)(2) of the New York Tax Law, as amended by TRARA, New York required "nonresident taxpayers and their nonresident spouses, like resident taxpayers and their resident spouses, [to] file a joint state income tax return (thereby reporting their aggregate incomes) if they filed a joint federal tax return." Brady v. State of New York, 172 A.D.2d 17, 20, 576 N.Y.S.2d 896, 898 (3rd Dept. 1991) (App. 18a). As amicus curiae in the New York Supreme Court, Appellate Division, the Commonwealth of Pennsylvania

supported the petitioners' claim that section 651(b)(2) denies to nonresidents substantive due process and equal protection under the Fourteenth Amendment to the United States Constitution since it imposes tax obligations to New York upon persons who have no contact with New York.

The Commonwealth of Pennsylvania also joined with the petitioners in New York in arguing that the New York Tax Law violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the United States Constitution since it allows to a New York resident taxpayer married to a nonresident the option of filing either a separate or joint state income tax return, while denying that option to a nonresident New York taxpayer. See Brady v. State of New

York, 172 A.D.2d at 20-21, 576 N.Y.S.2d at 898 (App. 18a).

Finally, Pennsylvania supported the petitioners' challenge to sections 601(d) and (e) of the Tax Law, which require inclusion of non-New York income in New York's income tax calculation as a violation of substantive due process and equal protection.[3]

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[3]In the Appellate Division of the Supreme Court of New York, all parties assumed in their briefs that sections 601(d) and (e) of the Tax Law did not -- independently of the joint filing requirement of section 651(b)(2) -- require a nonresident New York taxpayer to pay income tax to New York based upon his nonresident spouse's income as reported on their joint federal income tax return. Indeed, after the appellate division ruled section 651(b)(2) of the Tax Law to be unconstitutional, the Commissioner of Taxation and Finance announced that a nonresident New York taxpayer would not be required to report his spouse's income or to pay tax based on his spouse's income. Instead, he was allowed to recalculate his federal adjusted gross income as if he had filed

With respect to the issue of spousal income, the Appellate Division of the Supreme Court of New York reached only the petitioners' due process objection to section 651(b)(2) of the New York Tax Law. Striking down the joint filing requirement, the court relied upon this Court's decision in Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954), holding as follows:

> Out-of-state cohabitation with a spouse having New York income and filing a joint Federal income tax return with that spouse cannot constitute the necessary minimum connection for the extraterritorial exercise of New York's taxing power. Thus, we have concluded that

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an individual federal return.

> Tax Law §651(b)(2) violates due process insofar as it may be applied to require a nonresident spouse of a nonresident taxpayer to file a joint State tax return solely by reason of the marital relationship and the filing by the couple of a joint Federal income tax return.

Brady v. State of New York, 172 A.D.2d at 22, 576 N.Y.S.2d at 899 (App. 20a).

The New York appellate court did not reach the question of whether a requirement that spousal income be included in the calculation of a nonresident New York taxpayer's income tax liability would violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment or the Privileges and Immunities Clause of the United States Constitution. The court did not reach the other issues

because it concluded that sections 601(d) and (e) do not by themselves reach spousal income. In the opinion of the court, section 651(b)(2) was the sole statutory mechanism for reaching spousal income for tax calculation purposes. The court said:

> The foregoing ruling regarding Tax Law §651(b)(2) renders academic plaintiffs' constitutional challenges to the validity of Tax Law §601(d) and (e) that were based upon the interaction of those sections with section 651(b)(2). The language of Tax Law §601(d) and (e) is "marriage neutral". Once a nonresident spouse having no New York income is no longer obligated to file a joint return, the remaining sections of the Tax Law at issue here are not subject to the objection that they increase a nonresident taxpayer's State tax

> liability on the basis of the non-New York income of that taxpayer's nonresident spouse.

Id. (emphasis added) (App. 20a-21a).

Thus, the Appellate Division of the New York Supreme Court concluded that, without the unconstitutional requirement of section 651(b)(2) that a nonresident spouse of a nonresident New York taxpayer file a joint tax return with her spouse, subsections (d) and (e) of section 601 do not require a nonresident New York taxpayer to include in his individual tax return the income of his nonresident spouse even if the couple had filed a joint federal return.

2. Court of Appeals

New York did not appeal the decision of the appellate division declaring section 651(b)(2) of the New York Tax Law to be unconstitutional. Nor did New York appeal the ruling of the appellate division that subsections (d) and (e) of section 601 do not, independently of section 651(b)(2), require a nonresident New York taxpayer to include in his income tax return the non-New York income of the taxpayer's nonresident spouse. Only the petitioners appealed the appellate division ruling.

The petitioners contended on appeal, as they do in this Court, that sections 601(d) and (e) of the Tax Law are unconstitutional because they require inclusion of non-New York source income of the individual nonresident taxpayer in the tax calculation. However, even though

New York and its executive branch officials did not appeal the appellate division ruling, the New York Court of Appeals overruled the appellate division's interpretation of sections 601(d) and (e). Directly contrary to the opinion of the appellate division, and contrary to the arguments presented by the parties in the lower courts, the court of appeals held that sections 601(d) and (e), independently of section 651(b)(2), do require a nonresident taxpayer to report his nonresident spouse's income to New York and to calculate his tax liability based upon the joint income, regardless of the nonresident spouse's lack of contact with New York.

Thus, under the court of appeals' interpretation of New York law, spousal income is again attached by New York for

income taxation. Reversing his original adherence to the appellate division's ruling, the Commissioner of Taxation and Revenue no longer permits nonresident taxpayers to recalculate their federal adjusted gross income as if they had filed individually rather than jointly.

The court of appeals described the issue simply as "whether in fixing the [state] tax rate, New York can refer to spousal income included in the total adjusted gross income on the couple's federal return ... ." Brady v. State of New York, 80 N.Y.2d 596, 600n.1, 592 N.Y.S.2d 955, 956n.1, 607 N.E.2d 1060, 1061n.1 (1992) (emphasis added) (App. 4a). The court of appeals held that New York's authority to require the reporting of spousal income for purposes of calculating New York income tax liability, regardless

of the spouse's lack of contact with New York, "is unaffected by [the] holding" of the appellate division that section 651(b)(2) requiring joint filing by the spouse is unconstitutional. Id.[4] Therefore, even though New York did not appeal the appellate division determination that sections 601(d) and (e) of the Tax Law do not, without section 651(b)(2), in any way reach the income of a nonresident spouse of a nonresident New York taxpayer, the court of appeals held that sections 601(d) and (e) of the New York Tax Law do provide that New York will determine a nonresident's tax liability by

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[4]The appellate division clearly disagreed with the court of appeals on this issue of statutory construction since the appellate division believed it did not need to address the constitutionality of requiring the inclusion of spousal income in the determination of income tax liability once it struck down the joint filing requirement. App. 20a-21a.

taking into account both the taxpayer's income and the income of his nonresident spouse -- as "determined by reference to the taxpayer's 'federal adjusted gross income' (Tax Law §612[a])." Brady v. State of New York, 80 N.Y.2d at 600, 592 N.Y.S.2d at 957, 607 N.E.2d at 1062 (App. 4a).

With one of the five judges dissenting, the court of appeals rejected each of the arguments made by the petitioners, including the argument that substantive due process does not permit New York to include in the tax calculation of a nonresident taxpayer the separate income of a nonresident spouse who has had no contact with New York. The majority of the court of appeals explained the rationale for New York's tax system as follows:

> A system of progressive taxation apportions the tax burden based on ability to pay -- higher income taxpayers can pay more and are therefore taxed at a higher rate than lower income taxpayers.

Id., 80 N.Y.2d at 605, 592 N.Y.S.2d at 960, 607 N.E.2d at 1065 (App. 10a).

Implicit in the court of appeals' rationale upholding the New York Tax Law is the assumption that a nonresident New York taxpayers' income is defined not simply by his own income, but by the joint incomes of the taxpayer and his spouse. Based on that assumption, New York requires the reporting of the incomes of a nonresident New York taxpayer and his nonresident spouse as the measure of the

nonresident New York taxpayer's "ability to pay" income tax to New York. By implication, New York and its court of appeals has concluded that all marriage partners residing in another state necessarily share their individual incomes with one another and are a single economic entity for purposes of income taxation by New York. New York's assumption as to the unitary status of married couples is evidenced by the court of appeals' statements that "similarly situated taxpayers are those with the same total income," id., 80 N.Y.2d at 605, 592 N.Y.S.2d at 960, 607 N.E.2d at 1065 (App. 10a), and that the joint income of married couples is the true measure of their "ability to pay" New York tax. Id.[5]

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[5]By measuring a couple's "ability to pay" New York tax, the "economic reality" and "practical effect" of New York's taxing scheme is that nonresidents with

B. SECTIONS 601(D) AND (E) OF THE NEW YORK TAX LAW VIOLATE THE DUE PROCESS RIGHTS OF NONRESIDENTS

On its face, sections 601(d) and (e) of the New York Tax Law mandate that every nonresident who derives income from New York file a New York tax return reporting all of the taxpayer's income, from whatever jurisdiction derived. And as now construed by the Court of Appeals of New York, sections 601(d) and (e) also require a non-resident to report as well the income of his nonresident spouse if, for that tax year, the couple has elected

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no connection to New York whatsoever are compelled by "economic realities" to assist their spouses in paying income tax to New York. The practical effect upon the nonresident spouse is that he or she is to pay income tax to New York without having received individually any benefit or protection from New York and without having had any relevant contact with New York.

under federal law to file a joint return with the Internal Revenue Service. Sections 601(d) and (e) then require a nonresident New York taxpayer to pay income tax to New York based upon his total income and the total income of his nonresident spouse.

As construed by the court of appeals, therefore, a Pennsylvania resident who receives some or all of his income from New York, but whose spouse receives all of her income from Pennsylvania sources or other non-New York sources, is nevertheless required by New York law (subject to criminal and civil penalties) to disclose to New York both his entire income and the income of his spouse earned solely outside New York or derived solely from sources outside New York. Then, the New York Tax Law requires that the

nonresident taxpayer pay tax to New York based on both his income and income received solely by his spouse -- income which the taxpayer does not legally own or control, and from which he may not even derive any benefit. New York imposes these filing and payment obligations involving nonresident spousal income solely on the basis that the nonresident couple has filed a joint federal tax return.

Contrary to the limits of due process, the nonresident taxpayer is required to report his nonresident spouse's income and to pay tax based on his spouse's income to New York <u>even if the spouse has had not even one solitary transaction having any contact with the State of New York</u>. Indeed, under the New York Tax Law, the nonresident spouse of

the nonresident New York taxpayer would not even have had to step one foot into New York for the spouse's income to be the subject of the New York disclosure and tax requirements. Yet New York presumes to command a nonresident taxpayer residing in Pennsylvania or another state to pay tax to New York based on the income of another person, his spouse, who has had no contact with New York.

No conceivable argument under the Due Process Clause of the Fourteenth Amendment to the United States Constitution can constitutionally justify New York's overreaching into Pennsylvania to tax the income of Pennsylvania residents based upon the income of the taxpayer's spouse who has had no meaningful or relevant business or contact with New York. Because sections 601(d) and (e), as

construed by the court of appeals, do impose disclosure and tax obligations involving the income of Pennsylvanians and residents of other states who have had no contact with New York, i.e., spouses of nonresident New York taxpayers, the law exceeds the bounds of due process.

As this Court has held:

> If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition.

St. Louis v. Wiggins Ferry Co., 11 Wall.

(78 U.S.) 423, 430 (1871) (emphasis added). See also New York, L.E. & W. R. Co. v. Pennsylvania, 153 U.S. 628, 646 (1894). Thus, before New York can require a resident of Pennsylvania to comply with the requirements of its tax laws -- including the requirements of disclosure and taxation of income to New York -- New York must show some relevant "minimal contact" between New York and the person whose income it seeks to reach. National Bellas Hess, Inc. v. Illinois, 386 U.S. 753 (1967); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954).

Sections 601(d) and (e), as construed by the court of appeals, are clearly an attempt by New York to reach, for taxation, the incomes of Pennsylvania residents and other nonresidents of New York having no contact with New York but

who happen to be married to nonresident New York taxpayers. The New York law disregards the individual contacts of each member of a marital couple domiciled in Pennsylvania and other states. The economic reality and practical effect of the tax is to force a nonresident spouse who is constitutionally beyond the taxing authority of New York to contribute money to her spouse to pay tax to New York. It is no less a tax upon the spouse's income than if New York were to impose a tax directly upon the nonresident spouse, as it attempted to do under section 651(b)(2) before the appellate division ruled the joint filing requirement and liability obligation to be unconstitutional. This is precisely the type of broad, sweeping, extra-territorial tax law which this Court has said is prohibited by due process "as if in conflict with the most explicit

constitutional inhibition." Wiggins Ferry, supra, at 430.

C. NEW YORK TAX LAW INTERFERES WITH PENNSYLVANIA'S RIGHT TO DEFINE THE LEGAL RELATIONSHIPS OF ITS MARRIED COUPLES

In briefs filed in the New York courts, New York and its officials suggested that a nonresident of New York might have contacts with New York, sufficient to justify the imposition of income tax requirements or to require the reporting of joint income, simply "by virtue of the economic benefit derived from the New York income shared by the couple," or some "other [unspecified] contacts" which the nonresident spouse might have with New York (emphasis added). The suggestion of New York and its officials apparently is that New York may presume, in enacting its tax laws, that

married couples domiciled in other states are effectively one economic unit for purposes of the due process clause and that, therefore, New York may reach both of their incomes as the income of one tax entity.

Perhaps, in defining the marital relationship for its own domiciliaries, New York law permits the state to presume such "mutual economic benefit" between spouses. But Pennsylvania, for one, clearly does not presume such a relationship between married couples domiciled in Pennsylvania. It offends both due process and the most basic principles of comity when New York presumes to define and interfere with the economic relationships between spouses domiciled in Pennsylvania in direct contravention of Pennsylvania

constitutional law.

The Supreme Court of Pennsylvania held more than a decade ago that the government may not view spouses domiciled in Pennsylvania as one economic entity. It said:

> Any presumption of identity of interest is based upon the same outmoded social conditions and policy as was the common law legal fiction of unity of person of husband and wife. Judges, like all others, live and work in a real flesh and blood world, tempered by the social and cultural climate of the day... . Experience indicates, and all perceptive individuals inside and outside the legal profession know, that to say ... that husband and wife are one and that their interests are identical is an unmitigated fiction,

> an assumption supported by nothing more than the meager strength of its own weak assertion. This Court cannot and must not disregard the plain fact that spouses are no longer completely dependent upon one another either economically, socially or legally.
>
> ...
>
> Modern conditions demand that courts no longer engage in the automatic and unsupported assumption that one's pecuniary or proprietary interest is identical to that of one's spouse. For many years, parties to a marriage have often pursued independent careers, businesses and vocations... .

Estate of Grossman, 486 Pa. 460, 472-73, 406 A.2d 726, 732 (1979) (emphasis added). See also Denoncourt v. State Ethics Commission, 504 Pa. 191, 470 A.2d 945, 947

(1983).

Pennsylvania's policy of treating married couples as two separate, and socially, economically and legally independent persons, is directly frustrated when New York presumes that all married couples share the economic benefit of their joint income and thereby constitutionally subject both of their incomes to the taxing authority of New York. Comity among the states will not survive long if New York is permitted, in enacting laws affecting married couples in Pennsylvania, to ignore the clear pronouncements of Pennsylvania's highest court in defining the legal relationships of Pennsylvania's married couples. And consistent with the requirements of comity among the states, the due process clause cannot accept such flimsy rationalizations

as New York would proffer to justify the extra-territorial taxation and interference with fundamental rights that sections 601(d) and (e) of the New York Tax Law visit upon the residents of Pennsylvania.

There is also no basis, as New York has professed, which would justify its conclusion that the act of filing a joint federal income tax return expresses the joint and several "desires" of married couples "to be considered as a single taxable unit" by the State of New York or any other state or local taxing jurisdiction. Nor is there any basis for New York's argument that joint filing evidences a married couple's "willingness to be considered for tax purposes as a single taxable unit" by any taxing entity other than the United States. Individuals

are subject to tax by the United States government, and they individually make decisions in complying with federal tax law based upon considerations relating to the taxes imposed and the laws enacted by the United States Congress and the rules, regulations and requirements imposed by the Internal Revenue Service. Under those tax laws, many married couples make the decision to file a joint federal return. In formulating decisions under the tax laws enacted by the federal government to file a joint return with the Internal Revenue Service, married citizens in the United States do not thereby announce to the world their willingness or desire to be treated as a "single taxable unit" by any other jurisdiction or authority which might attempt to subject them to taxation.

There is absolutely nothing in federal statutory or constitutional law -- and New York has cited no authority -- which would permit New York to assume that the filing of a federal joint tax return establishes the "willingness" or "desire" of individuals to be treated by governments, other than the federal government, as a single taxable unit without regard to the individual rights and privileges guaranteed by due process. The filing of a joint federal tax return simply does not constitute a voluntary waiver of individual rights of due process guaranteed by the United States Constitution to be subject to taxation only by those states with whom the individual has had meaningful contact sufficient constitutionally to justify the tax obligation imposed by the state.

The filing of a joint federal tax return also does not diminish in any way the constitutional law of Pennsylvania which precludes the government from treating spouses as one economic entity. A Pennsylvania resident's filing of a joint federal tax return with his or her spouse, who earns or derives income subject to tax in New York, does not create any "contact" with New York which constitutionally could empower New York to reach across state lines to compel the Pennsylvania resident to report his income to New York or to assist his or her spouse in the payment of his New York tax liability. The income earned by a Pennsylvania resident remains his income and is not the income of the Pennsylvania resident's spouse. The filing of a federal joint tax return does not provide any constitutionally relevant connection

between the Pennsylvania resident who has no New York income and the income derived by his or her spouse from New York.

Because the filing of a joint federal tax return creates no "minimal contact" between New York and a Pennsylvania resident sufficient to empower New York constitutionally to cross state lines to impose tax liabilities and obligations upon Pennsylvania residents, sections 601(d) and (e) of the New York Tax Law violate due process.

D. SECTIONS 601(D) AND (E), WHEN COMPARED TO SECTION 651(B)(4), VIOLATE THE PRIVILEGES AND IMMUNITIES AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION

Pennsylvania also joins with the petitioners in their objection to the inexplicable favorable treatment received

by residents of New York married to nonresidents compared to New York's treatment of married couples who both reside outside of New York. Section 651(b)(4) of the Tax Law permits a New York resident who is married to a nonresident the option of filing a separate return reporting solely the resident's individual income. At the same time, sections 601(d) and (e) of the Tax Law require a nonresident taxpayer who is married to a nonresident with whom he has filed a joint federal tax return to report their joint income, resulting in a higher rate of taxation. By such disparate treatment that uniformly disadvantages nonresidents married to nonresidents compared to residents married to nonresidents, New York has failed "'to place the citizens of each state upon the same footing with citizens of other

States, so far as the advantages resulting from citizenship in those States are concerned.'" Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64 (1988) (quoting Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1969)).

An example will make the point. Assume two men -- Bob and Steve -- work together at the same firm in New York City and earn the same annual salary of $80,000. Neither has any other significant source of income. Steve resides in New York, while Bob resides in Pennsylvania. Assume further that both Bob and Steve are married to Pennsylvania residents. Bob is married to Amy, and Steve is married to Ruth. Assume further that both Amy and Ruth earn all of their incomes in Pennsylvania and have equal annual incomes of $30,000. Both couples

file a joint federal income tax return. Thus, the two couples' joint incomes are identical -- $110,000 for the year.

Under sections 601(d) and (e) of the New York Tax Law, Bob is required to file a New York tax return disclosing to New York both his individual income of $80,000 earned in New York and the income of $30,000 earned by his wife, Amy, in Pennsylvania. Bob is then required to pay to New York income tax at a rate determined by the joint income of $110,000 the couple reported on their federal tax return. Presumably New York justifies consideration of Amy's income with Bob's income on the unfounded assumption that both Amy's income and Bob's income are necessarily available to Bob to enable him to pay the New York tax which he owes under New York law. According to New

York, the couple's joint income is a better measure of Bob's ability to pay the New York tax which he owes as a result of his employment in New York than the amount of Bob's income alone.

By contrast, under section 651(b)(4) of the Tax Law, Steve is not required as a resident of New York to disclose his wife Ruth's income of $30,000 to New York; and Steve is not required to include Ruth's income in calculating his own tax liability on his income for the year. Thus, because he is a resident of New York, Steve pays income tax to New York at a rate determined solely by his own income of $80,000. By contrast, Bob is required to pay more tax to New York, on the identical amount of individual income as Steve received, based upon the addition of his income and his spouse's income. Thus,

solely because Steve is a resident of New York, he pays a lower rate of tax than Bob on identical incomes. Solely because he is a nonresident, Bob is forced by New York to pay a higher rate of tax on his income than his New York resident co-worker.

On what rationale could New York conceivably require the reporting of Amy's income for New York tax calculation, while the identical income earned by Ruth is beyond the taxing authority of New York? And why is nonresident Bob required to pay tax to New York at a rate higher than resident Steve is required to pay on taxable incomes which are identical, solely because Bob is a nonresident and Steve is a resident? There is absolutely no conceivable rationale for this preferential treatment given to residents

like Steve who have nonresident spouses. New York cannot rationally explain why residents like Steve, who have nonresident spouses, are not presumed by New York to enjoy the mutual economic benefits of their spouses' incomes, as New York apparently presumes to be the case for two nonresidents like Bob and Amy.

Under due process, neither Amy's nor Ruth's incomes earned solely in Pennsylvania should be the subject of New York's tax laws, and their spouses should not be required to report or consider their nonresident spouses' incomes in paying New York's tax. But in any event, under the Privileges and Immunities Clause and the Equal Protection Clause, New York may not treat Bob less favorably than Steve solely because Bob is a nonresident and Steve is a resident. Clearly, New

York does not provide equal treatment when one compares sections 601(d) and (e) with 651(b)(4) of the Tax Law. Therefore, sections 601(d) and (e) are unconstitutional unless the option of individual filing and reporting provided under section 651(b)(4) to residents married to nonresidents were afforded as well to nonresidents married to nonresidents.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to the Court of Appeals of New York in order to address the constitutionality of tax laws such as those of New York which ignore state lines, comity and respect for their neighboring states in their attempts to

generate revenue from sources outside their borders.

Respectfully submitted,

ERNEST D. PREATE
Attorney General of
Pennsylvania

Michael A. Roman
Chief Deputy Attorney
General
Tax Litigation Section
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(717) 783-1460

JAMES J. HAGGERTY
General Counsel of Pennsylvania

Gregory E. Dunlap
Deputy General Counsel
Office of General Counsel
P.O. Box 11775
333 Market Street
Harrisburg, PA 17108
(717) 783-6563

Attorneys for Amicus Curiae
Commonwealth of Pennsylvania

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ATTORNEY GENERAL OF COUNSEL:

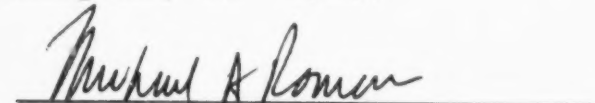
Honorable Jeffrey R. Howard
Attorney General of New Hampshire
25 Capitol Street
State House Annex
Concord, New Hampshire 03301

CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Brief of Amicus Curiae Commonwealth of Pennsylvania and New Hampshire in Support of Petition for Writ of Certiorari to be served upon the following attorneys by United States first class mail, postage prepaid:

Honorable Robert Abrams,
Attorney General of New York
Daniel Smirlock,
Assistant Attorney General
The Capitol
Albany, NY 12224

David H. Weinstein, Esquire
Robert S. Kitchenoff, Esquire
Lindsay B. Slaughter, Esquire
KOHN, NAST & GRAF, P.C.
1101 Market Street
Suite 2400
Philadelphia, PA 19107



Michael A. Roman
Chief Deputy Attorney General

DATED: May 21, 1993